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### ACUS--And Administrative Law--Then and Now

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# ACUS—And Administrative Law— Then and Now

Michael Herz\*

## ABSTRACT

*The Administrative Conference of the United States ("ACUS") both shapes and reflects the intellectual, policy, and practical concerns of the field of administrative law. Its recommendations are therefore a useful lens through which to view that field. Also, because of an unfortunate hiatus, ACUS has gotten underway not once but twice. Those two beginnings provide a kind of natural experiment, and they make a revealing contrast. This article traces the transformations of American administrative law, as well as the field's perpetual concerns, by comparing the initial recommendations of ACUS 1.0 (1968 to 1970) with the initial recommendations of ACUS 2.0 (2010 to 2013). ACUS issued its first recommendations in 1968. At the time, Richard Stewart's celebrated article, *The Reformation of American Administrative Law*, was still seven years away, and the rise of the interest representation model Professor Stewart identified was underway but not complete. Since then, administrative law has continued to be reformed, moving away from the interest representation model. Certain issues—for example, transparency, efficiency, and meaningful public participation—remain central preoccupations. However, new technologies, a shift from adjudication to rulemaking, the influence of the unitary executive model, and other developments, all woven into the more recent recommendations, make the contemporary field quite different from your grandfather's administrative law.*

## TABLE OF CONTENTS

INTRODUCTION .....	1218
I. THE AGES OF AMERICAN ADMINISTRATIVE LAW .....	1220
II. IN THE BEGINNING .....	1223
A. <i>Four Major Themes</i> .....	1223
1. Transparency .....	1224
2. Delay and Inefficiency .....	1226
3. Enhancing Public Participation in Agency Proceedings .....	1228
4. Increasing the Availability of Judicial Review ..	1230
B. <i>One Dog That Did Not Bark</i> .....	1232
III. THE SECOND TIME AROUND .....	1233
A. <i>Four Major Themes Redux</i> .....	1234

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1. Transparency .....	1234
2. Delay and Inefficiency .....	1236
3. Enhancing Public Participation in Agency Proceedings .....	1240
4. Judicial Review .....	1241
B. <i>Brave New World</i> .....	1242
1. Technology .....	1242
2. Progress .....	1244
3. The Shift from Adjudication to Rulemaking ....	1245
4. The Shift in Specific Agencies .....	1247
5. The Shift in Regulatory Missions and Agendas .	1247
6. Increasing Attention to the Problem of "Silos" .	1248
7. Presidential Management .....	1249
CONCLUSION .....	1250

## INTRODUCTION

In Gilbert and Sullivan's *The Pirates of Penzance, or the Slave of Duty*,<sup>1</sup> our hero, Frederic, is apprenticed to a band of pirates until he turns twenty-one. Just as he is about to reach the keenly anticipated end of his apprenticeship, it is revealed that he was born on February 29th in a leap year. Under the articles of apprenticeship, he is indentured until his twenty-first *birthday*, not his twenty-first *year*. Accordingly, he is only a quarter of the way through. Hilarity ensues.

This celebration of the Administrative Conference's fiftieth anniversary confronts the inverse problem. Whereas Frederic had seen twenty-one *years* but far fewer than twenty-one *birthdays*, ACUS has seen fifty *birthdays* but not fifty *years*. It was "born" in August 1964, when President Johnson signed the Administrative Conference Act.<sup>2</sup> But there have been a few gaps—if ACUS were a job applicant, it would have a lot of explaining to do about the holes in its resume. First, it took four years to get up and running.<sup>3</sup> Then, as everyone in

1 1 W.S. Gilbert, *The Pirates of Penzance, or the Slave of Duty*, in THE ANNOTATED GILBERT AND SULLIVAN 83 (Ian Bradley ed., 1982).

2 Administrative Conference Act, Pub. L. No. 88-499, 78 Stat. 615 (1964) (codified as amended at 5 U.S.C. §§ 591-96 (2012)).

3 President Johnson nominated Jerre Williams as the first Chairman of ACUS on October 14, 1967. ADMIN. CONFERENCE OF THE U.S., 1969 ANNUAL REPORT: ADMINISTRATIVE CONFERENCE OF THE UNITED STATES 4 (1970). Williams was confirmed five days later; he actually got to work on January 8, 1968; the first plenary session was in May 1968. *Id.* at 4, 26. The then-head of the Office of Legal Counsel, Frank Wozencraft, points to three reasons for the delay. First, standing up the new agency was "nobody's priority," and everyone was just very busy. *Transcript: Forty-Second Session of the Administrative Conference of the United States*, 53 U. PITT. L. REV. 857, 864 (1992) (remarks of Frank Wozencraft). Second, "it was a strange animal, a her-

the administrative law world knows only too well, it was defunded in the mid-1990s, only reemerging in 2010.

Thus, there is a nice jurisprudential question as to whether this fiftieth anniversary celebration is quite kosher. However, if rigid literalism was good enough for the Pirate King and the wretched Frederic, it is good enough for me. So, fifty Augusts having come and gone since ACUS was created, I am delighted to be participating in this tribute to ACUS on the occasion of its fiftieth anniversary (give or take).

Indeed, I would like to take advantage of ACUS's awkward fourteen-and-a-half year dormant period to structure my contribution to this special issue. The hibernation resulted in, as they are usually referred to, "ACUS 1.0" and "ACUS 2.0."<sup>4</sup> ACUS got underway not once but twice; not once but twice it surveyed the field of administrative law looking for important topics—areas of solvable inefficiency or unfairness, to use the terms that recur in its statute.<sup>5</sup> But those two beginnings were far apart in time—ten February 29ths had come and gone between them. The world was a rather different place in 2010 than it had been in 1968. Accordingly, reviewing the recommendations from ACUS's first three years—or, to be precise, from ACUS's *first* first three years—and comparing them with those from ACUS's *second* first three years will reveal something about how the world of administrative law has, and has not, changed.

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maphrodite combination of Government and public members. . . . Until the Conference existed, it was very hard to imagine what it would be like, what it would actually do. Its mission blended the academic approach with the practical problems of Government. That's what makes ACUS so valuable, but it made it hard to sell." *Id.* And, finally, "it was unbelievably difficult to find the first chairman." *Id.*

<sup>4</sup> I believe it was Jeffrey Lubbers who first used these terms. See Jeffrey S. Lubbers, *ACUS 2.0 and Its Historical Antecedents*, ADMIN. & REG. L. NEWS, Spring 2011, at 9.

<sup>5</sup> The original Administrative Conference Act expressed Congress's desire to ensure "maximum efficiency and fairness" in the administrative process, Administrative Conference Act § 2(b), noted agency heads' responsibility to "assur[e] fair and efficient administrative procedure," *id.* § 2(c), articulated the desire that "private rights may be fully protected and . . . Federal responsibilities may be carried out expeditiously," *id.* § 2(e), and charged ACUS with studying "the efficiency, adequacy, and fairness of the administrative procedure used by administrative agencies," *id.* § 5(a). ACUS 2.0 operates under a slightly different and broader set of legislative purposes, see 5 U.S.C. § 591, but the key provision regarding "powers and duties" remains unchanged. In particular, each incarnation was given the authority to "study the efficiency, adequacy, and fairness of the administrative procedure used by administrative agencies in carrying out administrative programs, and make recommendations." Administrative Conference Act § 5(a); 5 U.S.C. § 594(1).



## I. THE AGES OF AMERICAN ADMINISTRATIVE LAW

Before turning to the recommendations themselves, it is worth getting a sense of the lay of the land. ACUS has not operated in a vacuum; it has been both a shaper, and a product, of the political, judicial, and academic preoccupations that characterized its different eras. Thus, it makes sense to begin with a review of the overall settings in which it has operated.

The central conceptual project of administrative law is to legitimate and cabin agencies' exercise of discretion. Scholars have laid out a generally accepted historical account of the shifting approaches to this challenge.<sup>6</sup> A century ago, agency exercises of discretionary authority were justified under the so-called "transmission belt" theory, under which agencies truly were *agents* and Congress remained the principal.<sup>7</sup> On this account, agencies had little discretion; they merely found facts and implemented the legislature's policy prescriptions in light thereof.<sup>8</sup> The traditional model emphasized the necessity of legislative authorization of, and constraints on, agency discretion, as well as reliance on procedures designed to ensure compliance with legislative directives and the availability of judicial review to do the same.<sup>9</sup>

The traditional model began to crack with the New Deal, when it became inescapably clear that the assumptions on which it was based were simply inaccurate. Agencies *were* exercising significant discretion, barely constrained by legislative directive.<sup>10</sup> A different theory of legitimacy was needed, and it was found in the principle of agency expertise. On this understanding, agencies face decisions that are essentially technocratic and have right and wrong answers; because agencies base their decisions on expertise, concerns about whim, pref-

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<sup>6</sup> See, e.g., STEPHEN G. BREYER ET AL., *ADMINISTRATIVE LAW AND REGULATORY POLICY* 17–29 (7th ed. 2011); Mark Seidenfeld, *The Role of Politics in a Deliberative Model of the Administrative State*, 81 GEO. WASH. L. REV. 1397, 1403–16 (2013); Sidney Shapiro et al., *The Enlightenment of Administrative Law: Looking Inside the Agency for Legitimacy*, 47 WAKE FOREST L. REV. 463, 471–76 (2012); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1671–76 (1975).

<sup>7</sup> See, e.g., Stewart, *supra* note 6, at 1675.

<sup>8</sup> See, e.g., Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1758 (2007).

<sup>9</sup> See *id.* ("By confining agencies to legislative directives, administrative procedures, as enforced by the Court, served to promote fairness and rationality.").

<sup>10</sup> Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 471 (2003) (noting that the transmission belt theory "simply did not describe the government we had after about 1930"); Stewart, *supra* note 6, at 1677 ("[A]fter the delegation by New Deal Congresses of sweeping powers . . . the broad and novel character of agency discretion could no longer be concealed behind such labels.").

erence, clashing values, or ideology can be set aside. As Richard Stewart has put it, on this model “persons subject to the administrator’s control are no more liable to his arbitrary will than are patients remitted to the care of a skilled doctor.”<sup>11</sup>

The expertise model, too, suffered from exposure to the real world. Already, during the debates over the Administrative Procedure Act (“APA”),<sup>12</sup> adopted in 1946, expansive agency discretion had many critics. The APA can be seen as a compromise, accepting agency policymaking and enforcement discretion while seeking to avoid its abuse through the twin tools of procedural protections and judicial review.<sup>13</sup> That compromise held for the next two decades, as the traditional understandings matured but were not abandoned.<sup>14</sup>

The mid-1960s, however, saw another shift, and it was a fundamental one. As “[p]ublic trust in regulation and the administrative process began to disintegrate,” courts became more aggressive in reviewing the substance of agency decisions and in requiring expansive procedures.<sup>15</sup> This was also a period of intense concern that agencies had been captured by the very interests they were supposed to be regulating.<sup>16</sup> The cure for capture was seen as full participation by all affected interests.<sup>17</sup> So, just as the transmission belt model had yielded to the expertise model, now the expertise model yielded to an “interest representation” model.<sup>18</sup> On this account, the administrative process was legitimate because, and only to the extent that, it replicated the pluralist legislative process; therefore all interests had to be able to participate fully and effectively. In particular, agencies and the courts had to open their doors to regulatory beneficiaries.

The interest representation model yielded in turn, about fifteen years later, to a focus on presidential control. Sidney Shapiro calls this the “counter-reformation.”<sup>19</sup> The roots of modern presidentialism can be found in the Nixon Administration’s *Quality of Life Review*,

11 Stewart, *supra* note 6, at 1678.

12 Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

13 BREYER ET AL., *supra* note 6, at 22.

14 *Id.* at 23.

15 *Id.* at 24.

16 Thomas W. Merrill, *Capture Theory and the Courts: 1967–1983*, 72 CHI.-KENT L. REV. 1039, 1050 (1997).

17 See, e.g., Simon Lazarus & Joseph Onek, *The Regulators and the People*, 57 VA. L. REV. 1069, 1074–76, 1092–106 (1971).

18 See Stewart, *supra* note 6, at 1722–30.

19 Sidney A. Shapiro, *Administrative Law After the Counter-Reformation: Restoring Faith in Pragmatic Government*, 48 U. KAN. L. REV. 689, 697, 707–08 (2000).

but it was the arrival of Ronald Reagan in the White House in 1981 that marked the real beginning of the era of “presidential administration.”<sup>20</sup> This model highlights the president’s unique position as the one government official who is nationally elected. The theory emphasizes the unitary executive, centralized regulatory review, and legitimation through presidential control.<sup>21</sup>

Have we left this era of presidential control? Not really; presidential administration is as robust as ever.<sup>22</sup> But it is possible that the model may be changing in important ways yet again:

Unlike past transformations, the most important current developments are not legal in nature; they are technological. Administrative law now both relies on and is shaped by the Internet and associated technologies. . . . [A]gency Web sites, use of social media, “e-rulemaking,” wide dissemination of government information via the Internet—these have transformed the day-to-day operations of agencies. . . . Many see technological innovation as promising to fundamentally transform the nature of administration and the relationship between agency and citizen, enabling a new era of democratic participation, cooperation, and informed agency decisionmaking.<sup>23</sup>

Accepting at least the rough outlines of this thumbnail sketch, ACUS straddles three periods. It got under way just at the moment that the “reformation” was starting to take hold; it was in operation, and then on unpaid leave, as the presidential model became ascendant; and it returned to business as agencies were rapidly deploying new technologies. In particular, ACUS’s two beginning periods occurred just as new conceptualizations of the administrative process were—or may now be—taking hold. Accordingly, ACUS’s work product should reflect these shifts, or at least display different emphases in different eras. On the other hand, the agency has operated under the same statutory mandate and with the same basic structure

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20 See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2276–80 (2001) (observing that President Reagan laid the foundation for an administrative state that functioned as an extension of the president’s policy agenda); see also Bressman, *supra* note 10, at 487. President Reagan’s most important initiative was Executive Order 12,291, which established the modern version of centralized review of proposed regulations by the Office of Information and Regulatory Affairs. See Exec. Order No. 12,291, 3 C.F.R. 127–34 (1982).

21 See Bressman, *supra* note 10, at 485–87; Kagan, *supra* note 20, at 2331–32.

22 See, e.g., Nina A. Mendelson & Jonathan B. Wiener, *Responding to Agency Avoidance of OIRA*, 37 HARV. J.L. & PUB. POL’Y 447, 454–63 (2014).

23 BREYER ET AL., *supra* note 6, at 29.

throughout, which should bring a certain consistency of theme and approach.

## II. IN THE BEGINNING

Between 1968 and 1970, the Administrative Conference produced twenty-two recommendations, which will be the focus of this review. These seem enough to be a representative sample, while still reflecting a particular moment in time. Three years is a pretty long “moment,” to be sure, but in the grand scheme of things, it is quite brief. It provides a snapshot, not a movie. Or, if a movie, then *My Dinner with André*,<sup>24</sup> not *Boyhood*.<sup>25</sup> These recommendations also make a tidy, self-contained corpus because they were all published together in the first volume of ACUS’s *Recommendations and Reports*.<sup>26</sup> The review for ACUS 2.0 will cover the same length of time; this second set of recommendations numbers twenty-five, produced from the end of 2010 through 2013.<sup>27</sup>

### A. Four Major Themes

What seem to have been the major issues confronting the wise men of administrative law<sup>28</sup> in 1968? Various characterizations of the first twenty-two recommendations are possible, but the following themes dominate: transparency, reducing delay and inefficiency, enhancing public participation in agency proceedings, and increasing the availability of judicial review.

24 MY DINNER WITH ANDRÉ (Saga Prods., Inc. 1981).

25 BOYHOOD (IFC Prods. 2014).

26 1 ADMIN. CONFERENCE OF THE U.S., RECOMMENDATIONS AND REPORTS OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES (1968–1970) [hereinafter RECOMMENDATIONS AND REPORTS].

27 The twenty-two recommendations from the first three years of ACUS 1.0, numbers 68-1 through 70-5, are summarized in Appendix A, *infra*. The twenty-five recommendations produced during the first three years of ACUS 2.0, numbers 2010-1 through 2013-7 (plus Statement 18), are summarized in Appendix B, *infra*.

28 And they were indeed (almost) all men. As of 1970, the Chairman was male, the ten-member Council was all male, and the eighty-six then present and former members of the Conference included a grand total of three women: Carolyn Agger, Patricia Harris, and Charlotte Tuttle Lloyd. See RECOMMENDATIONS AND REPORTS, *supra* note 26, at ii, 3–6. By contrast, as of this writing, four of the nine Council members are female, see *Council Roster*, ADMIN. CONF. U.S., <http://www.acus.gov/directory/council> (last visited Sept. 5, 2015), as are thirty-seven of the eighty-two members of the Assembly, see *Government Members Roster*, ADMIN. CONF. U.S., <http://www.acus.gov/directory/government-member> (last visited Sept. 5, 2015); *Public Members Roster*, ADMIN. CONF. U.S., <http://www.acus.gov/directory/public-member> (last visited Sept. 5, 2015). So one highly notable change between ACUS 1.0 and 2.0 is in the gender (im)balance within the Conference (and the field, and the profession, generally).



### 1. Transparency

Though the term is anachronistic and cannot be found in the early reports or recommendations, what we would now call transparency was a fundamental concern in the early recommendations. Indeed, it is central to a significant plurality of these recommendations. For example:

- Recommendation 68-2 pointed out that the *U.S. Government Manual*, the official handbook of the federal government, contained descriptions of agencies that were often “outdated, un-revealing, cumbersome, or otherwise deficient.”<sup>29</sup> It urged all agencies to review and rewrite their entries, and, in particular, to include therein instructions as to how to obtain additional information.<sup>30</sup>
- Recommendation 68-3<sup>31</sup> offered a similar lament about the Parallel Table of Statutory Authorities and Rules.<sup>32</sup> This is a two-column list of all statutory provisions on which agencies relied in issuing regulations, together with the Code of Federal Regulations citations for those regulations.<sup>33</sup> The recommendation reported that the Table was highly inaccurate and incomplete and urged agencies to submit cleaned-up versions to the Office of the Federal Register.<sup>34</sup>
- Recommendation 68-4 urged publication of a “Consumer Bulletin,” circulated to “the press, consumer organizations, public and scholastic libraries, and individuals who request to be put on the mailing list,” which would describe recent federal agency actions of interest and significance to consumers.<sup>35</sup>
- Recommendation 69-3, *Publication of a “Guide to Federal Reporting Requirements,”* recommended publishing a listing of

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29 ADMIN. CONFERENCE OF THE U.S., RECOMMENDATION 68-2, U.S. GOVERNMENT ORGANIZATION MANUAL 1 (1968), <https://www.acus.gov/recommendation/us-government-organization-manual>.

30 *Id.*

31 ADMIN. CONFERENCE OF THE U.S., RECOMMENDATION 68-3, PARALLEL TABLE OF STATUTORY AUTHORITIES AND RULES (2 CFR CH. I) 1 (1968), <https://www.acus.gov/recommendation/parallel-table-statutory-authorities-and-rules-2-cfr-ch-i>.

32 See Parallel Table of Authorities and Rules, C.F.R. INDEX 833 (2014), [http://www.gpo.gov/help/parallel\\_table.pdf](http://www.gpo.gov/help/parallel_table.pdf).

33 *Id.*

34 RECOMMENDATION 68-3, *supra* note 31, at 12.

35 ADMIN. CONFERENCE OF THE U.S., RECOMMENDATION 68-4, CONSUMER BULLETIN 1 (1968), <http://www.acus.gov/recommendation/consumer-bulletin>.



agency reporting requirements and their statutory or regulatory bases.<sup>36</sup>

- Recommendation 69-4 urged agencies to determine whether analytic subject indexes for their Code of Federal Regulations (“CFR”) volumes would be appropriate and, if so, to produce such indexes.<sup>37</sup>
- Recommendation 69-6 called on agencies to compile statistics regarding all their proceedings—rulemaking and adjudication, formal and informal—indicating how many of each were initiated, concluded, and pending each year.<sup>38</sup>
- Recommendation 70-2 was a set of proposals regarding the U.S. Securities and Exchange Commission (“SEC”) no-action letter process “intended to enable the public and individual stockholders to be more fully advised of the interpretations, policies and precedents which guide the conclusions of the Commission and the staff.”<sup>39</sup>

Finally, Recommendation 70-5 concerned the processes of the now-defunct Renegotiation Board, which was authorized to eliminate “excessive profits” earned by any government contractor receiving more than \$1 million a year.<sup>40</sup> The recommendation called on the Board to make public the apparently mysterious factors on which it relied in determining whether profits were “excessive.”<sup>41</sup>

In reading these recommendations, it is striking how strongly the Conference seemed to feel that the general public, regulated entities, and even sophisticated players were operating in the dark. Government operations appear to have been extraordinarily opaque. In part,

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<sup>36</sup> ADMIN. CONFERENCE OF THE U.S., RECOMMENDATION 69-3, PUBLICATION OF A “GUIDE TO FEDERAL REPORTING REQUIREMENTS” 1 (1969), <https://www.acus.gov/recommendation/publication-guide-federal-reporting-requirements>.

<sup>37</sup> ADMIN. CONFERENCE OF THE U.S., RECOMMENDATION 69-4, ANALYTICAL SUBJECT-INDEXES TO SELECTED VOLUMES OF THE CODE OF FEDERAL REGULATIONS 1 (1969), <https://www.acus.gov/recommendation/analytical-subject-indexes-selected-volumes-code-federal-regulations>.

<sup>38</sup> ACUS Recommendation 69-6, Compilation of Statistics on Administrative Proceedings by Federal Departments and Agencies, 1 C.F.R. § 305.69-6 (1993).

<sup>39</sup> ADMIN. CONFERENCE OF THE U.S., RECOMMENDATION 70-2, SEC NO-ACTION LETTERS UNDER SECTION 4 OF THE SECURITIES ACT OF 1933, at 1(1970) <https://www.acus.gov/recommendation/sec-no-action-letters-under-section-4-securities-act-1933>.

<sup>40</sup> STAFF OF THE J. COMM. ON INTERNAL REVENUE TAXATION, 93D CONG., SUMMARY OF RENEGOTIATION ACT OF 1951 AND RENEGOTIATION BOARD PROPOSAL FOR EXTENSION (Comm. Print 1973).

<sup>41</sup> ADMIN. CONFERENCE OF THE U.S., RECOMMENDATION 70-5, PRACTICES AND PROCEDURES UNDER THE RENEGOTIATION ACT OF 1951, at 1 (1970) <http://www.acus.gov/recommendation/practices-and-procedures-under-renegotiation-act-1951>.

the problems were of the most fundamental sort; they involved the inability to find law. Beyond that, ACUS was concerned with the unavailability of basic information about agency operations. All of these recommendations aim at avoiding secret law, making requirements and decisionmaking criteria easier to find, and providing information about how agencies actually operate.

## 2. *Delay and Inefficiency*

In December 1960, former Harvard Law School Dean James Landis submitted a report to President-elect Kennedy regarding regulatory agencies.<sup>42</sup> The report reviewed various problems bedeviling federal agencies and offered suggestions for fixing them (one of which, importantly, was creation of an administrative conference).<sup>43</sup> In his account of problems to be solved, Landis gave delay pride of place, observing that "[i]nordinate delay characterizes the disposition of adjudicatory proceedings before substantially all of our regulatory agencies."<sup>44</sup> Not surprisingly, ACUS's early years reveal a near-obsession with delay.

Many of the early recommendations flagged the problem of delay and offered some remedies. The two most significant of these were major proposals, both since widely adopted, for speeding up formal adjudications. First, Recommendation 68-6 urged greater delegation of final decisional authority to intermediate appellate boards within agencies, stressing that not every final decision had to be made by the agency itself.<sup>45</sup> In the underlying report, James Freedman, drawing on Landis, identified delay as one of the "two fundamental problems that threaten and often compromise the effectiveness of the administrative process."<sup>46</sup> Second, Recommendation 70-3 endorsed agency summary

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42 CHAIRMAN OF THE SUBCOMM. ON ADMIN. PRACTICE & PROCEDURE OF THE S. COMM. ON THE JUDICIARY, 86TH CONG., REP. ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT (Comm. Print 1960) (report of James McCauley Landis) [hereinafter Landis].

43 *Id.* at 74 ("The concept of an Administrative Conference of the United States promises more to the improvement of administrative procedures and practices and to the systematization of the federal regulatory agencies than anything presently on the horizon."). Prompted by the Landis Report, among other things, President Kennedy established a temporary Administrative Conference by executive order in April 1961. Exec. Order No. 10,934, 26 Fed. Reg. 3233 (Apr. 15, 1961). But I do not want to dwell on this early iteration, let alone its 1953-1955 predecessor, see Lubbers, *supra* note 4, at 9 nn.6-10, for fear that someone might suggest we have already missed the Conference's fiftieth anniversary.

44 Landis, *supra* note 42, at 5.

45 ACUS Recommendation 68-6, Delegation of Final Decisional Authority Subject to Discretionary Review by the Agency, 1 C.F.R. § 305.68-6 (1993).

46 James O. Freedman, *Report of the Committee on Agency Organization and Procedure in Support of Intermediate Appellate Boards: Subparagraph 1(a) of Recommendation No. 6*, in REC-

judgment procedures to avoid unnecessary hearings.<sup>47</sup> The underlying report, by Ernest Gellhorn, began thus: “Delay is widely acknowledged as a major inadequacy of the administrative process.”<sup>48</sup>

Other more focused recommendations aimed at problems of delay included:

- Recommendation 69-2 urged that National Labor Relations Board (“NLRB”) orders be made automatically judicially enforceable (as are those of most other independent agencies) so that the Board would no longer need to seek affirmative judicial confirmation of its orders.<sup>49</sup> The recommendation noted that “[t]he present practice burdens the courts with unnecessary proceedings whose only product is delay rather than added protection against ill-founded action.”<sup>50</sup>
- Recommendation 69-6 proposed compilation of comprehensive statistics regarding agency actions.<sup>51</sup> Much of the motivation for the recommendation was concern about delay and the need to get a handle on the scope of the problem.<sup>52</sup>

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COMMENDATIONS AND REPORTS, *supra* note 26, at 125, 125. The second fundamental problem was “failure to achieve coherent policy formulation.” *Id.* In the ensuing years, both problems came to be seen as having the same solution, at least in part: a shift from adjudication to rulemaking as the primary mechanism for policymaking. *See infra* note 104 and accompanying text. But that shift was not yet perceived in 1968—at least, such a perception is not evident in the Conference’s work product.

<sup>47</sup> ACUS Recommendation 70-3, Summary Decision in Agency Adjudication, 1 C.F.R. § 305.70-3 (1993).

<sup>48</sup> Ernest Gellhorn, *Report of the Committee on Agency Organization and Procedure in Support of Recommendation No. 20*, in RECOMMENDATIONS AND REPORTS, *supra* note 26, at 545, 545.

<sup>49</sup> ACUS Recommendation 69-2, Judicial Enforcement of Orders of the National Labor Relations Board, 1 C.F.R. § 305.69-2 (1993).

<sup>50</sup> *Id.*; *see also* Admin. Conference of the U.S., *Report of the Committee on Judicial Review in Support of Recommendation No. 10*, in RECOMMENDATIONS AND REPORTS, *supra* note 26, at 238, 238 (“[Precluding the NLRB from issuing automatically enforceable orders] serves no useful purpose but operates to delay the effectiveness of NLRB orders and to impose unnecessary costs on the Board.”). This recommendation resurrected a recommendation of the 1961–1962 Administrative Conference; the report accompanying that recommendation is replete with references to the delays caused by the existing procedure. *See id.* at 244, 249–51, 254–58.

<sup>51</sup> ACUS Recommendation 69-6, Compilation of Statistics on Administrative Proceedings by Federal Departments and Agencies, 1 C.F.R. § 305.69-6 (1993).

<sup>52</sup> *See* Staff of the Office of the Chairman, *Report of the Committee on Licenses and Authorizations in Support of Recommendation No. 14*, in RECOMMENDATIONS AND REPORTS, *supra* note 26, at 287, 288 (“In particular, the problem of inordinate delays in the administrative process demands statistical study.”); *see also id.* at 289 (“The Committee is of the view that time has run out for casual efforts to combat inordinate delays in agency proceedings. The Committee believes that an intensive and concerted attack upon this persistent problem is long overdue.”).

- Recommendation 69-5 urged elimination of duplicative hearings in Federal Aviation Administration ("FAA") safety decertification cases.<sup>53</sup>

Finally, concerns about delay were also an aspect of the recommendations and reports concerning selection and qualifications of hearing examiners (Recommendation 69-9)<sup>54</sup> and discovery (Recommendation 70-4).<sup>55</sup>

### 3. *Enhancing Public Participation in Agency Proceedings*

A third theme that runs through multiple recommendations is the principle that it should be easier for private entities, especially those lacking wealth and legal representation, to participate effectively in agency proceedings. These recommendations are, of course, the purest expressions of the "interest representation" model that was taking hold as ACUS began operation.<sup>56</sup> Many of the recommendations having to do with transparency are examples; their implicit premise was that the *reason* it should be easier to access the law and learn about agency operations was that as things stood no one but the most sophisticated insiders could do so.<sup>57</sup> These concerns also underlie two of the boldest early recommendations.

The first of these is Recommendation 68-5, *Representation of the Poor in Agency Rulemaking of Direct Consequence to Them*.<sup>58</sup> It urged federal agencies to undertake affirmative efforts and outreach to ensure input from poor people with regard to rulemakings that might have a substantial effect on the poor.<sup>59</sup> These efforts could include holding hearings in convenient locations, directly soliciting submissions from representatives of the poor, conducting field surveys of

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<sup>53</sup> ADMIN. CONFERENCE OF THE U.S., RECOMMENDATION 69-5, ELIMINATION OF DUPLICATIVE HEARINGS IN FAA SAFETY DE-CERTIFICATION CASES 1 (1969), <https://www.acus.gov/recommendation/elimination-duplicative-hearings-faa-safety-de-certification-cases>.

<sup>54</sup> ACUS Recommendation 69-9, Recruitment and Selection of Hearing Examiners; Continuing Training for Government Attorneys and Hearing Examiners; Creation of a Center for Continuing Legal Education in Government, 1 C.F.R. § 305.69-9 (1988); see Robert E. Park, *Report of the Committee on Personnel in Support of Recommendation No. 17*, in RECOMMENDATIONS AND REPORTS, *supra* note 26, at 381, 393, 397.

<sup>55</sup> See ACUS Recommendation 70-4: Discovery in Agency Adjudication, 1 C.F.R. § 305.70-4 (1988); Edward A. Tomlinson, *Report of the Committee on Compliance and Enforcement Proceedings in Support of Recommendation No. 21*, in RECOMMENDATIONS AND REPORTS, *supra* note 26, at 577, 578-79, 591, 600-07, 628, 635, 644.

<sup>56</sup> See *supra* text accompanying notes 18-19.

<sup>57</sup> See *supra* Part II.A.1.

<sup>58</sup> ACUS Recommendation 68-5, Representation of the Poor in Agency Rulemaking of Direct Consequence to Them, 1 C.F.R. § 305.68-5 (1993).

<sup>59</sup> *Id.* at 57-58.



poor people, and setting up advisory committees consisting of representatives of poor people.<sup>60</sup> When necessary, agencies should directly reimburse individuals for expenses or lost wages resulting from participating in a rulemaking.<sup>61</sup> In its most controversial provision, the recommendation called on Congress to establish and fund a quasi-governmental "People's Counsel," the staff of which would "represent the interests of the poor in all Federal administrative rulemaking substantially affecting the poor."<sup>62</sup> To modern ears—at least, to this author's modern ears—the calls for financial support and creation of a People's Counsel are among the most anachronistic of the early recommendations, reflecting a distant, unrecoverable past.

The People's Counsel idea, with its slightly communist resonances, never really caught hold. Funding to support private participation in agency proceedings did enjoy some modest success in the 1970s. Congress authorized certain agencies to provide such payments, and as many as fourteen agencies adopted some sort of program to compensate for the costs of participation.<sup>63</sup> But these efforts fell by the wayside with the arrival of the Reagan administration and have never been resurrected.<sup>64</sup> In 1971, ACUS itself backed away a little from the idea. In a recommendation directly addressed to enhancing public participation in rulemaking, it considered but rejected a proposal from the Committee on Agency Organization and Procedure to recommend that agencies actually fund citizen participation.<sup>65</sup>

The other relatively bold proposal aimed at enhanced public participation was Recommendation 69-8,<sup>66</sup> which advocated eliminating

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<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 58.

<sup>62</sup> *Id.* at 58–59. This was the only of the first twenty-two recommendations to elicit dissenting statements from members of the Conference who disagreed. Six separate statements were filed. Most of these objected to the People's Counsel proposal. See RECOMMENDATIONS AND REPORTS, *supra* note 26, at 16–20.

<sup>63</sup> For a general overview, see Carl Tobias, *Great Expectations and Mismatched Compensation: Government Sponsored Public Participation in Proceedings of the Consumer Product Safety Commission*, 64 WASH. U. L.Q. 1101, 1101–09 (1986).

<sup>64</sup> See *id.* at 1108–09.

<sup>65</sup> See *id.* at 1104; see also Ernest Gellhorn, *Public Participation in Administrative Proceedings*, in 2 ADMIN. CONFERENCE OF THE U.S., RECOMMENDATIONS AND REPORTS OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES at 376, 401, 406 (1970–1972). Then-ACUS Chairman Roger Cramton, on the other hand, was open to the idea. See Roger C. Cramton, *The Why, Where and How of Broadened Public Participation in the Administrative Process*, 60 GEO. L.J. 525, 541–46 (1972) (reviewing different possible mechanisms for payment of attorneys' fees for members of the public participating in agency proceedings).

<sup>66</sup> ACUS Recommendation 69-8, Elimination of Certain Exemptions from the APA Rulemaking Requirements, 1 C.F.R. § 305.69-8 (1993).



the exemption from the APA's rulemaking requirements for rules regarding "public property, loans, grants, benefits, or contracts"<sup>67</sup> and urged agencies to go through the notice-and-comment process for such rules even when not statutorily required to do so.<sup>68</sup> This proposal did not make much headway in Congress, and this sweeping exemption remains in place. However, Congress has required some agencies that would otherwise fall within the exemption to provide notice and comment,<sup>69</sup> and many agencies have, as the recommendation urged, voluntarily committed to following section 553 rulemaking procedures even though they do not have to.<sup>70</sup> This recommendation rests on a belief in the value of public input in rulemaking. Indeed, the underlying report begins with a lengthy discussion explaining why public participation in rulemaking is important.<sup>71</sup>

#### 4. *Increasing the Availability of Judicial Review*

A final theme is the desire to make judicial review of agency action more easily available. Perhaps out of unease about making recommendations directly to the courts, the Conference did *not* take on the most obvious barrier to review, namely, restrictive standing rules, which were in flux at the time.<sup>72</sup> But it did address three more technical barriers.

First, Recommendation 68-7<sup>73</sup> urged Congress to eliminate the generally applicable amount-in-controversy requirement, then

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<sup>67</sup> 5 U.S.C. § 553(a)(2) (2012).

<sup>68</sup> ACUS Recommendation 69-8, 1 C.F.R. § 305.69-8, at 62.

<sup>69</sup> See, e.g., 38 U.S.C. § 501(d) (2012) ("The provisions of section 553 of title 5 shall apply, without regard to subsection (a)(2) of that section, to matters relating to loans, grants, or benefits under a law administered by the Secretary [of Veterans Affairs].").

<sup>70</sup> See, e.g., Public Participation in Rulemaking, 36 Fed. Reg. 2532, 2532 (Feb. 5, 1971) (referring to the ACUS recommendation and directing all agencies and offices within the Department of Health, Education, and Welfare to follow § 553 requirements even if exempt under subsection (a)(2)); Public Participation in Rulemaking, 36 Fed. Reg. 13,804, 13,804 (July 24, 1971) (instituting the same policy in the Department of Agriculture). In 2013, the Department of Agriculture revoked the policy. See Revocation of Statement of Policy on Public Participation in Rulemaking, 78 Fed. Reg. 64,194, 64,194 (Oct. 28, 2013). For criticism of that change, see William Funk, *U.S. Department of Agriculture's Revocation of 40+-Year-Old Policy on Engaging in Notice-and-Comment Rulemaking*, ADMIN. & REG. L. NEWS, Winter 2014, at 15, 15-16.

<sup>71</sup> Arthur E. Bonfield, *Report of the Committee on Rulemaking in Support of Recommendation No. 16*, in RECOMMENDATIONS AND REPORTS, *supra* note 26, at 306, 306-09.

<sup>72</sup> See Elizabeth Magill, *Standing for the Public: A Lost History*, 95 VA. L. REV. 1131, 1151-59 (2009) (describing key federal appellate decisions at this time as simultaneously broadening and narrowing standing for members of the public).

<sup>73</sup> ADMIN. CONFERENCE OF THE U.S., RECOMMENDATION 68-7, ELIMINATION OF JURISDICTIONAL AMOUNT REQUIREMENT IN JUDICIAL REVIEW 1 (1968), <https://www.acus.gov/recommendation/elimination-jurisdictional-amount-requirement-judicial-review>.

\$10,000,<sup>74</sup> for lawsuits against the government and its agents. Second, Recommendation 69-1, *Statutory Reform of the Sovereign Immunity Doctrine*, asserted that “[t]he technical legal defense of sovereign immunity . . . has become in large measure unacceptable” and suggested amending the APA to make clear that sovereign immunity does not bar challenges to agency action.<sup>75</sup> Third, Recommendation 70-1 sought to eliminate dismissal of actions against agencies where the plaintiff failed to identify the defendant properly; it called on the Department of Justice to draw such defects to the court’s attention in order to allow the plaintiff to amend its pleadings and on Congress to make statutory amendments to liberalize standards for naming government defendants and serving process.<sup>76</sup> ACUS’s then-Executive Director, John Cushman, explained:

In innumerable cases a citizen’s lawsuit against the Government has been dismissed solely because the United States or one of its agencies was improperly identified in the citizen’s complaint, or could not be joined as a defendant. Thus, simply because of virtually inexplicable technical matters, the merits of many just claims have not been considered.<sup>77</sup>

Cushman’s comment went specifically to the rigidity of pleading standards in suits against the government, but it captures the general sense underlying all three of these recommendations: existing law posed pointless technical barriers to access to judicial review of agency action.<sup>78</sup>

Notably, all three of these recommendations were written into law by Congress in 1976.<sup>79</sup> They are among the Conference’s most important contributions.

<sup>74</sup> See 28 U.S.C. § 1331 (2012) (explaining in supplemental notes that this section imposed a \$10,000 amount-in-controversy requirement from 1958 until 1980).

<sup>75</sup> ADMIN. CONFERENCE OF THE U.S., RECOMMENDATION 69-1, STATUTORY REFORM OF THE SOVEREIGN IMMUNITY DOCTRINE 1 (1969), <https://www.acus.gov/recommendation/statutory-reform-sovereign-immunity-doctrine>.

<sup>76</sup> ADMIN. CONFERENCE OF THE U.S., RECOMMENDATION 70-1, PARTIES DEFENDANT 1-2 (1970), <http://www.acus.gov/recommendation/parties-defendant>.

<sup>77</sup> John F. Cushman, *Administrative Conference of the United States: Report on the Fourth Plenary Session*, 22 ADMIN. L. REV. 623, 623 (1970).

<sup>78</sup> One other, more targeted, recommendation probably falls into this category. Recommendation 68-8, *Judicial Review of Interstate Commerce Commission Orders*, proposed that Interstate Commerce Commission cases, which were then sent to a three-judge district court, should instead be heard by the Courts of Appeals, as were the decisions of essentially all other agencies. ADMIN. CONFERENCE OF THE U.S., RECOMMENDATION 68-8, JUDICIAL REVIEW OF INTERSTATE COMMERCE COMMISSION ORDERS 1 (1968), <https://www.acus.gov/recommendation/judicial-review-interstate-commerce-commission-orders>.

<sup>79</sup> See Act of Oct. 21, 1976, Pub. L. No. 94-574, § 1, 90 Stat. 2721 (rewriting §§ 702 and 703

### B. *One Dog That Did Not Bark*

One might also ask what ACUS's initial efforts ignored. By definition, that is a long list. But one concern loomed large at the time and is notably absent, or at least hidden, in these recommendations: agency capture. Reviewing the history of capture theory, Thomas Merrill identifies 1967 as the starting point of the period in which understandings of the administrative process, and many efforts to reform it, were informed, if not driven, by concerns over capture.<sup>80</sup> And capture was a "major preoccupation"<sup>81</sup> of the Landis Report. Landis did not use that term, but he did discuss the phenomenon, observing that "[i]ndustry orientation of agency members is a common criticism, frequently expressed in terms that the regulatees have become the regulators."<sup>82</sup> Yet nothing in the first three years was explicitly or overtly responsive to that concern. Indeed, the *only* reference to "capture" in any of the first twenty-two recommendations and reports appears, unexpectedly, in Arthur Bonfield's report supporting creation of a "Poor People's Counsel."<sup>83</sup> Bonfield acknowledged that the folks actually employed in such an office would probably themselves be not poor, but middle class. He stressed, therefore, that "great pains should be taken, and special procedures instituted, to prevent [the staff] from being captured or dominated by a middle-class point of view."<sup>84</sup> That is an interesting sort of regulatory capture, but *not* the classic conception of regulatory capture, in which the regulator serves the interests of the regulated entity. Moreover, Bonfield did not apply his idea of agency capture to a typical (or even an actual) agency.

Now the fact that one does not see the term "capture" thrown about does not mean that the problem was not on the minds of mem-

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to remove the defense of sovereign immunity and to permit a party challenging agency action to name the United States, the agency, or the appropriate officer as defendant); *id.* § 2 (eliminating the amount-in-controversy requirement in suits "against the United States, any agency thereof, or any officer or employee thereof in his official capacity").

<sup>80</sup> See Merrill, *supra* note 16, at 1043, 1050. In particular, the late 1960s were a period of particular prominence for Ralph Nader, the leading—and, at the time, enormously influential—diagnoser and decrier of agency capture. See, e.g., EUGENE BARDACH & ROBERT A. KAGAN, GOING BY THE BOOK: THE PROBLEM OF REGULATORY UNREASONABLENESS 44–45 (1982).

<sup>81</sup> William J. Novak, *A Revisionist History of Regulatory Capture*, in PREVENTING REGULATORY CAPTURE 25, 29 (Daniel Carpenter & David A. Moss eds., 2014).

<sup>82</sup> Landis, *supra* note 42, at 70.

<sup>83</sup> Arthur E. Bonfield, *Report of the Committee on Rulemaking in Support of Recommendation No. 5*, in RECOMMENDATIONS AND REPORTS, *supra* note 26, at 79, 97, 106 (expressing concern that a Poor People's Counsel might be "captured by the ideas and values of the government agencies before which it would represent the interests of the poor").

<sup>84</sup> *Id.* at 98.

bers of the Conference. Many of the recommendations did urge reforms that others were promoting as responses to agency capture. In particular, capture theorists sought (1) greater and more effective public participation in agency processes<sup>85</sup> and (2) enhanced judicial review of agency action.<sup>86</sup> As we have seen, so did ACUS.<sup>87</sup> It may be that the recommendations along these lines were in fact indirectly responsive to concerns over capture, though demonstrating whether or not that was the case would be challenging indeed.

It is also possible, however, that the silence regarding capture reveals something about ACUS. It is crammed with experts, but most work in federal agencies, and many of the others are lawyers who represent the firms that, on the traditional theory, have captured the agencies.<sup>88</sup> These may not be the right people to perceive, or be bothered by, capture, if indeed it exists. Alternatively, they are the people who would best know whether it does, and they may have concluded that it does not. At a minimum, the silence on capture theory seems to reflect a kind of *politesse*. If capture is a problem—a contested proposition, of course—ACUS is not likely to be the entity that would rise to decry it.

### III. THE SECOND TIME AROUND

ACUS 2.0 produced its first recommendation, on the subject of preemption, in December 2010.<sup>89</sup> In the ensuing three years, it produced twenty-three more as well as one “statement.”<sup>90</sup> Recommencing four decades after it had issued the recommendations reviewed above, what about ACUS’s subjects and recommendations remained constant, and what is new?

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<sup>85</sup> See, e.g., Lazarus & Onek, *supra* note 17, at 1074–76, 1092–1106 (decrying the captured nature of the independent agencies and urging, among other things, fuller—and agency-funded—public participation in agency processes as a remedy).

<sup>86</sup> See Merrill, *supra* note 16, at 1052, 1064–66 (describing the 1970s doctrinal developments enhancing judicial power at the expense of agency power as resulting from a concern with agency pathology in general and capture in particular).

<sup>87</sup> See *supra* Parts II.A.3–4.

<sup>88</sup> See *Assembly*, ADMIN. CONF. U.S., <http://www.acus.gov/assembly> (last visited Sept. 5, 2015) (containing biographies of all voting and non-voting members).

<sup>89</sup> ACUS Recommendation 2010-1, Agency Procedures for Considering Preemption of State Law, 76 Fed. Reg. 81 (Jan. 3, 2011).

<sup>90</sup> See *Recommendations*, ADMIN. CONF. U.S., <http://www.acus.gov/recommendations> (last visited Sept. 5, 2015) (containing recommendations).



### A. *Four Major Themes Redux*

The fundamental issues with which ACUS grapples are in some ways unchanged. At a certain level of generality, transparency, delay, and effective public participation remain the three essential themes. Enhanced judicial review has largely disappeared, as discussed below. But the details have changed.

#### 1. *Transparency*

Categorizing the recent recommendations requires some judgment calls, especially because transparency and public participation overlap and some recommendations have elements of both. But one plausible breakdown suggests that about a third of these recommendations are about transparency (a term that does now appear, with some frequency, in the recommendations and reports). Most prominently, these include:

- Recommendation 2011-2, *Rulemaking Comments*. This recommendation calls on agencies to provide guidance on how to submit effective comments, develop and announce clear policies for anonymous and late-filed comments, and make submitted comments quickly available online.<sup>91</sup>
- Recommendation 2011-5, *Incorporation by Reference*. This is the modern recommendation most directly concerned with the “secret law” problem. It seeks to ameliorate, though not eliminate, the burdens involved in commenting on regulatory proposals, and finding actual legal requirements, when agencies’ proposed or final regulations incorporate by reference material that is not freely available, often is copyrighted, and can cost hundreds or thousands of dollars to purchase.<sup>92</sup>
- Recommendation 2011-7, *Federal Advisory Committee Act*. The Federal Advisory Committee Act (“FACA”)<sup>93</sup> is a set of transparency provisions seeking to bring sunshine to the agency practice of relying on groups of nongovernmental advisors.<sup>94</sup> The recommendation accepts this congressional goal and aims to identify measures that would alleviate the Act’s procedural

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<sup>91</sup> ACUS Recommendation 2011-2, *Rulemaking Comments*, 76 Fed. Reg. 48,791, 48,791 (Aug. 9, 2011).

<sup>92</sup> ACUS Recommendation 2011-5, *Incorporation by Reference*, 77 Fed. Reg. 2257, 2257–58 (Jan. 17, 2012).

<sup>93</sup> Federal Advisory Committee Act, 5 U.S.C. app. §§ 1–16 (2012).

<sup>94</sup> ACUS Recommendation 2011-7, *The Federal Advisory Committee Act—Issues and Proposed Reforms*, 77 Fed. Reg. 2261, 2261–62 (Jan. 17, 2012).



burdens while enhancing transparency and objectivity.<sup>95</sup> It is alert to the possibility that in this area there can be too much of a good thing, though it does not propose any significant rolling back of transparency requirements for federal advisory committees.<sup>96</sup>

- Recommendation 2013-7,<sup>97</sup> *Government Performance and Results Act (GPRA) Modernization Act of 2010*.<sup>98</sup> The recommendation offers guidance to help increase transparency, improve information sharing, and facilitate better agency reporting under the Government Performance and Results Act,<sup>99</sup> a little-known 1993 law designed to “improve government performance by requiring agencies to set quantifiable performance goals and then to assess their performance against their goals.”<sup>100</sup>
- Recommendation 2012-3, *Immigration Removal Adjudication*. This is a sweeping recommendation touching on many aspects of immigration adjudications. But one critical section focuses on efforts to compile thorough and accurate data regarding the immigration courts’ workload and develop and publicize performance metrics.<sup>101</sup>

In addition, five separate recommendations involve electronic rulemaking.<sup>102</sup> While these most obviously belong in the public partic-

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<sup>95</sup> *Id.* at 2263–64.

<sup>96</sup> Going outside this Article’s self-imposed constraints, a later recommendation regarding the Government in the Sunshine Act can be described just the same way—that is, it reflects some backlash against transparency requirements but does not propose a major overhaul. See ACUS Recommendation 2014-2, *Government in the Sunshine Act*, 79 Fed. Reg. 35,990, 35,991 (June 25, 2014).

<sup>97</sup> ACUS Recommendation 2013-7, *GPRA Modernization Act of 2010: Examining Constraints to, and Providing Tools for, Cross-Agency Collaboration*, 78 Fed. Reg. 76,273 (Dec. 17, 2013).

<sup>98</sup> *Government Performance and Results Act (GPRA) Modernization Act*, 5 U.S.C. § 306; 31 U.S.C. §§ 1115–16, 1120–25 (2012).

<sup>99</sup> *Government Performance and Results Act of 1993*, Pub. L. No. 103-62, 107 Stat. 285 (codified as amended at 5 U.S.C. § 306, 31 U.S.C. §§ 1115–19, 31 U.S.C. §§ 9703–04, 39 U.S.C. §§ 2801–05 (2012)).

<sup>100</sup> William Funk, *Political Checks on the Administrative Process*, in *A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES* 211, 240 (John F. Duffy & Michael Herz eds., 2005).

<sup>101</sup> ACUS Recommendation 2012-3, *Immigration Removal Adjudication*, 77 Fed. Reg. 47,804, 47,804–05 (Aug. 10, 2012).

<sup>102</sup> See ACUS Recommendation 2011-1, *Legal Considerations in e-Rulemaking*, 76 Fed. Reg. 48,789 (Aug. 9, 2011); ACUS Recommendation 2011-2, *Rulemaking Comments*, 76 Fed. Reg. 48,791 (Aug. 9, 2011); ACUS Recommendation 2011-8, *Agency Innovations in E-Rulemaking*, 77 Fed. Reg. 2264 (Jan. 17, 2012); ACUS Recommendation 2013-4, *The Administrative Re-*

ipation category, each also seeks to ensure the visibility and accessibility of the rulemaking process and its products.

Finally, Recommendation 2012-1, *Regulatory Analysis*, emphasizes transparency concerns. It encourages agencies to catalogue and publicize generally applicable analysis requirements and, in any given rulemaking, to identify explicitly which such requirements apply and which do not.<sup>103</sup>

## 2. *Delay and Inefficiency*

Concerns over delay still figure prominently in the modern recommendations, but the issue is no longer the near-obsession it once was. This shift surely is *not* because the battle has been won. Rather, it seems more likely that the concern has receded because of the move from adjudication to rulemaking.<sup>104</sup> In the first twenty-two recommendations, the delays of concern were exclusively those arising in adjudications.<sup>105</sup> Delays in the rulemaking process were not on anyone's radar. The more recent suite of recommendations remains concerned about delays in *adjudications*. Thus, Recommendation 2011-4, regarding video hearings, is directed at agencies with high-volume caseloads, urging them to consider videoconferencing as a way of improving efficiency or reducing costs.<sup>106</sup> Similarly, Recommendation 2012-3, regarding immigration removal adjudications, begins by noting that "[o]ne of the biggest challenges identified in the adjudication of immigration removal cases is the backlog of pending proceedings and the limited resources to deal with the caseload."<sup>107</sup> Much of the recommendation is directed at understanding and reducing the backlog and delays that characterize the present system.<sup>108</sup> Thus, ACUS 2.0 has addressed the most prominent aspects of delay in contemporary adjudications.<sup>109</sup>

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cord in Informal Rulemaking, 78 Fed. Reg. 41,358 (July 10, 2013); ACUS Recommendation 2013-5, Social Media in Rulemaking, 78 Fed. Reg. 76,269 (Dec. 17, 2013).

<sup>103</sup> ACUS Recommendation 2012-1, *Regulatory Analysis Requirements*, 77 Fed. Reg. 47,801, 47,801-02 (Aug. 10, 2012).

<sup>104</sup> See, e.g., Richard J. Pierce, Jr., *Rulemaking and the Administrative Procedure Act*, 32 TULSA L.J. 185, 188-90 (1996) (discussing the rise of agency rulemaking in the 1960s and 1970s).

<sup>105</sup> See *supra* notes 42-55 and accompanying text (discussing ACUS's early recommendations aimed at eliminating delays).

<sup>106</sup> ACUS Recommendation 2011-4, *Agency Use of Video Hearings: Best Practices and Possibilities for Expansion*, 76 Fed. Reg. 48,795, 48,796 (Aug. 9, 2011).

<sup>107</sup> ACUS Recommendation 2012-3, *Immigration Removal Adjudication*, 77 Fed. Reg. 47,804, 47,804 (Aug. 10, 2012).

<sup>108</sup> *Id.* at 47,804-08.

<sup>109</sup> Two other recommendations address inefficiencies in other aspects of the administrative

Delay and inefficiency in the *rulemaking* process have also received some attention. The two most important instances are Recommendation 2012-1, concerning regulatory analysis,<sup>110</sup> and Statement 18, concerning OIRA review of regulations.<sup>111</sup> The first of these does acknowledge the burdens imposed by the multiple analytic requirements that apply to agency rulemakings,<sup>112</sup> often labeled (though not by ACUS) “paralysis by analysis.”<sup>113</sup> But it is careful not to take a position on whether existing requirements are excessive.<sup>114</sup> Nor does it state that further analytic requirements should not be imposed.<sup>115</sup> Rather, it urges streamlining existing requirements to the extent possible, particularly by being alert to the possibility that overlapping requirements could be consolidated.<sup>116</sup> Similarly, Statement 18 expresses concern that OIRA review simply takes too long, delaying the rulemaking process, but it stops short of a formal recommendation

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process. See ACUS Recommendation 2012-4, Paperwork Reduction Act, 77 Fed. Reg. 47,808, 47,808–10 (Aug. 10, 2012) (suggesting ways to streamline the process for approval of information collection requests); ACUS Recommendation 2011-6, International Regulatory Cooperation, 77 Fed. Reg. 2259, 2260 (Jan. 17, 2012) (suggesting ways in which agencies could more efficiently join forces with their foreign counterparts).

<sup>110</sup> ACUS Recommendation 2012-1, Regulatory Analysis Requirements, 77 Fed. Reg. 47,801 (Aug. 10, 2012).

<sup>111</sup> ACUS Statement # 18, 78 Fed. Reg. 76,275 (Dec. 17, 2013).

<sup>112</sup> ACUS Recommendation 2012-1, 77 Fed. Reg. at 47,801–02.

<sup>113</sup> See, e.g., Cary Coglianese, *The Rhetoric and Reality of Regulatory Reform*, 25 YALE J. ON REG. 85, 89 (2008) (“‘Paralysis by analysis’ has become a cliché in regulatory circles today.”).

<sup>114</sup> “Although the Conference seeks to assure that existing analytic requirements are applied in the most efficient and transparent manner possible, it does not address whether the number or nature of those requirements might not be reduced in light of their cumulative impact on agencies.” ACUS Recommendation 2012-1, 77 Fed. Reg. at 47,801. As per the request for proposals, see Megan Kindelan, *ACUS Announces 2 New RFPs: PRA and Regulatory Analysis*, ADMIN. CONF. U.S. (Aug. 4, 2011, 1:42 PM), <http://www.acus.gov/newsroom/administrative-fix-blog/acus-announces-2-new-rfps-pra-and-regulatory-analysis> (“The study should assess whether or not the analysis requirements have caused an ossification of the rulemaking process.”), the underlying report devoted considerable attention to the ossification of the rulemaking process, see CURTIS W. COPELAND, *REGULATORY ANALYSIS REQUIREMENTS: A REVIEW AND RECOMMENDATIONS FOR REFORM* 66–74 (2012). However, the committee producing the recommendation decided to leave any discussion of ossification out of the final recommendation. See COMM. ON REGULATION, ADMIN. CONFERENCE OF THE U.S., MINUTES: MAY 3, 2012, at 2 (2012), <https://www.acus.gov/sites/default/files/documents/Draft-Meeting-Minutes-5.03.2012-revised.pdf>.

<sup>115</sup> See ACUS Recommendation 2012-1, 77 Fed. Reg. at 47,801. An older recommendation was more forceful: “Congress should reconsider the need for continuing statutory analytical requirements that necessitate broadly applicable analyses or action to address narrowly-focused issues.” ACUS Recommendation 93-4, *Improving the Environment for Agency Rulemaking*, 59 Fed. Reg. 4670, 4673 (Feb. 1, 1994), corrected at 59 Fed. Reg. 8507 (Feb. 22, 1994).

<sup>116</sup> ACUS Recommendation 2012-1, 77 Fed. Reg. at 47,801–02.

and does not in any way call into question the value of OIRA review.<sup>117</sup>

These three forays into the problem of rulemaking delays are meaningful, but amount to less than one might have expected. After all, recent decades have seen much wailing and gnashing of teeth regarding the “ossification” of the rulemaking process.<sup>118</sup> The ossification theme has been so pronounced, and ACUS’s core mission so focused on addressing delay and inefficiency, that it is somewhat surprising that ACUS 2.0 has not pursued the issue of delay and inefficiency in rulemaking as aggressively as ACUS 1.0 went after those problems in adjudication.

Three possible explanations come to mind. One is simply that twenty years ago ACUS did issue a recommendation aimed at reducing rulemaking ossification.<sup>119</sup> It may just not have much more to say on the matter.

Second, the ossification thesis is not universally accepted. Though compelling, it is more anecdotal than data-driven, and several recent empirical studies have suggested that it is overblown.<sup>120</sup> If indeed the rulemaking process is humming along efficiently, then that would explain why ACUS has not addressed delays therein. This explanation is unconvincing, however. For one thing, there is just no getting around the fact that the rulemaking process is enormously burdensome and time-consuming; the fact that it has not ground to a halt does not mean that there are not opportunities to speed it up. In any event, most observers (including most members of ACUS, one would assume) in fact accept the ossification thesis,<sup>121</sup> notwithstanding the mixed empirical studies.

The third explanation is that it is not clear that there is a consensus within ACUS, or within Washington, or among informed observers generally, in favor of an efficient and speedy rulemaking process.

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117 ACUS Statement # 18, 78 Fed. Reg. 76,275 (Dec. 17, 2013).

118 See, e.g., Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 DUKE L.J. 1385, 1385–96 (1992).

119 See Recommendation 93-4, *supra* note 115.

120 See Anne Joseph O’Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889, 936 (2008) (suggesting that volume of agency rulemaking shows it is not ossified); Jason Webb Yackee & Susan Webb Yackee, *Testing the Ossification Thesis: An Empirical Examination of Federal Regulatory Volume and Speed, 1950–1990*, 80 GEO. WASH. L. REV. 1414, 1475 (2012). But see Richard J. Pierce, Jr., *Rulemaking Ossification Is Real: A Response to Testing the Ossification Thesis*, 80 GEO. WASH. L. REV. 1493, 1493–98, 1502–03 (2012).

121 See, e.g., Pierce, *supra* note 120, at 1493, 1498; Yackee & Yackee, *supra* note 120, at 1418–19.



It is hard to be in favor of delays in adjudication as a systemic matter. Of course, as between the parties to an adjudication, delay will often favor at least one of them. But as a systemic matter, that benefit will generally be precisely offset by the disadvantage to the other party. Moreover, adjudication resolves legal rights; the systemic interest would be in clarifying legal rights rather than having lingering uncertainty. There is no legitimate interest in—and much human and economic cost to—delaying the resolution of legal rights beyond the time necessary to do the job properly. But rulemaking is different. Rulemaking generally involves the establishment of new legal requirements.<sup>122</sup> Accordingly, those who are dubious about the value of new regulations may systemically value an *inefficient* rulemaking process. Exactly this justification has been offered in favor of the difficult process for enacting legislation under the U.S. Constitution.<sup>123</sup> And a longstanding argument in favor of a nondelegation doctrine with teeth is that we should be concerned about having too much law,<sup>124</sup> and that allowing delegations to agencies will result in more law precisely because it is easier for agencies to write regulations than it is for Congress to enact laws.<sup>125</sup> The near-complete partisan division over legislative proposals to expand the APA's rulemaking requirements<sup>126</sup> seems to confirm this assessment.

In short, ACUS's tendency to steer away from the ossification issue reflects something new, important, and disheartening about the field of administrative law. Disagreements over regulatory substance are affecting debates over rulemaking procedure in a way that is new (and does not infect debates over adjudicatory procedure). One would imagine people who thought agencies should issue lots of regulations and people who thought they should issue almost none could

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<sup>122</sup> “Generally,” because rulemaking can of course also involve the elimination or dilution of regulatory requirements.

<sup>123</sup> See, e.g., John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 72–73 (2001).

<sup>124</sup> See Mila Sohoni, *The Idea of “Too Much Law,”* 80 FORDHAM L. REV. 1585, 1612 (2012).

<sup>125</sup> See, e.g., *Environmental Regulations, the Economy, and Jobs: Hearing Before the Subcomm. on Env't & Econ. of the H. Comm. on Energy & Commerce*, 112th Cong. 44 (2011) (statement of Christopher DeMuth, D.C. Searle Senior Fellow, American Enterprise Institute for Public Policy Research) (“Regulatory delegation . . . has permitted the Congress to accommodate the never-ending political demands for government intervention to a far greater degree than legislation alone could have accomplished. . . . The size, scope, reticulation, and minuteness of the modern ‘nanny state’ is an artifact of regulatory delegation: it could not have been achieved and it could not be managed through direct legislation.”).

<sup>126</sup> See, e.g., H.R. REP. NO. 113-237, at 17–18 (2013); 157 CONG. REC. H8105 (daily ed. Dec. 2, 2011) (vote on Regulatory Accountability Act).



still agree on a sensible process for producing those regulations.<sup>127</sup> At present, that does not seem to be the case.

### 3. *Enhancing Public Participation in Agency Proceedings*

The importance of ensuring that rulemaking is open to effective participation by all members of the public remains a recurrent concern in the more recent round of recommendations. It is very much at the heart of the five recommendations regarding e-rulemaking.<sup>128</sup> At the same time, there has been a meaningful shift. The first set of recommendations was concerned with ensuring that *representatives* of affected interests could meaningfully participate. The most obvious example is the 1968 recommendation regarding the need to ensure adequate representation of the interests of poor people in rulemaking.<sup>129</sup> It was an instantiation of the interest representation model of the "reformed" administrative law. That meant, in part, the abandonment of a model in which there was such a thing as "the public interest" as opposed to the sum of various particular interests.<sup>130</sup> Indeed, one of the dissenting statements regarding the proposal objected to it on exactly this ground: "I consider unsound attempts to fractionate the public interest which is properly the concern of our Federal administrative agencies."<sup>131</sup>

In the modern era, the "public interest" remains elusive. But the interest representation model has itself crumbled. Two alternatives vie to replace it. One, discussed below, is the idea of presidential control.<sup>132</sup> A second involves direct citizen engagement. Much of the most optimistic writing about new technologies and governance assumes that individuals will be able to participate *directly*, not through representatives.<sup>133</sup> Whether that might in fact happen very much re-

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<sup>127</sup> Members of the Administrative Conference did exactly that in an important recommendation from the early 1990s. See ACUS Recommendation 93-4, Improving the Environment for Agency Rulemaking, 59 Fed. Reg. 4670 (Feb. 1, 1994).

<sup>128</sup> See *supra* note 102.

<sup>129</sup> ACUS Recommendation 68-5, Representation of the Poor in Agency Rulemaking of Direct Consequence to Them, 1 C.F.R. § 305.68-5 (1993).

<sup>130</sup> See *supra* Part II.A.3.

<sup>131</sup> RECOMMENDATIONS AND REPORTS, *supra* note 26, at 20 (dissenting statement of Robert W. Graham opposing Recommendation 68-5).

<sup>132</sup> See *infra* Part III.B.7.

<sup>133</sup> See, e.g., John M. de Figueiredo, *E-Rulemaking: Bringing Data to Theory at the Federal Communications Commission*, 55 DUKE L.J. 969, 975 (2006) (describing the view that e-rulemaking will enable individual participation and so "enhance[] the democratic process in rulemaking which, in turn, increases bureaucratic legitimacy and federal government credibility, strengthens individual autonomy and rights of self-governance, increases public understanding of rulemaking, and enhances the accountability of administrative agencies to other branches of govern-

mains to be seen. ACUS's recommendations have been somewhat agnostic on the question. The recent recommendations, however, are more open to the idea of *direct* participation by affected interests and do not focus much on adequate *representation* of particular interests.

#### 4. Judicial Review

Of the four primary themes of the first set of recommendations, judicial review is the one that has largely disappeared from the modern counterparts. Only three recommendations concern judicial review, and each addresses an issue that is relatively narrow and technical. Recommendation 2013-6 explores the contours of the courts' occasional, and contested, practice of remanding a defective agency action without setting that action aside.<sup>134</sup> Recommendation 2013-4 offers suggestions regarding how agencies should compile, and what should be included in, the "record" in an informal rulemaking.<sup>135</sup> Finally, Recommendation 2012-6 suggests a statutory amendment to a technical provision regarding the jurisdiction of the Court of Federal Claims.<sup>136</sup>

Issues of judicial review remain, and will always be, central to the overall administrative law regime. ACUS will always have a judicial review committee. But of the four primary themes of the early years, this is the one that seems most dilute in the contemporary counterparts. Not only are there only three recommendations from the judicial review committee, but none concerns what was the focus of the judicial recommendations by ACUS 1.0—expanding the availability of judicial review. Presumably, this shift reflects (1) the fact that, in part thanks to ACUS, the availability of judicial review *has* been expanded since the 1960s, and (2) some loss of enthusiasm for the benefits of judicial review for the administrative process since the pre-*Vermont*

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ment") (citations omitted); Beth Simone Noveck, *Evolving Democracy for the 21st Century* 6–8, <http://cairns.typepad.com/files/evolving-democracy.pdf> (paper prepared for the Club de Madrid 2011 Annual Conference, Nov. 8–9, 2011, New York City) (imagining broad, direct public input into legislation).

<sup>134</sup> ACUS Recommendation 2013-6, Remand Without Vacatur, 78 Fed. Reg. 76,272 (Dec. 17, 2013).

<sup>135</sup> ACUS Recommendation 2013-4, The Administrative Record in Informal Rulemaking, 78 Fed. Reg. 41,358 (July 10, 2013). ACUS members in the early years would have been perplexed by this topic, which would have struck them as involving an oxymoron. It is a sign of how modern understandings of the nature of informal rulemaking, and the review of informal rulemaking, have developed that there could be a recommendation on this topic at all.

<sup>136</sup> ACUS Recommendation 2012-6, Reform of 28 U.S.C. Section 1500, 78 Fed. Reg. 2939, 2940–41 (Jan. 15, 2013).

*Yankee*<sup>137</sup> days of an extremely muscular judicial role, particularly in the D.C. Circuit.

## B. *Brave New World*

The previous section emphasized the common themes between our two time periods. That commonality is real, and at a high level of generality these basic concerns—transparency, efficiency, participation, and appropriate judicial review—seem perpetual, central issues of the administrative state. But, as we saw, this description hides some equally important changes regarding the specifics. In addition, new themes have developed and new issues arisen that were not even a gleam in ACUS's eye in the late 1960s. This section turns to those issues.

### 1. *Technology*

The biggest single transformation in agency operations between 1968 and 2010 has resulted from the rise of the personal computer and related technologies, especially the Internet. In ACUS's first three years, not a single recommendation involved new technological possibilities. Indeed, from a technological point of view, there is little if anything in these recommendations that could not have been produced in the years 1868 to 1870. The recommendations make no mention—none—of computers.<sup>138</sup>

The same year the Administrative Conference Act was signed into law, IBM's most compelling and popular exhibit at the New York World's Fair was the selectric typewriter.<sup>139</sup> Inkblings of the technologi-

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<sup>137</sup> *Vt. Yankee Nuclear Power Corp. v. NRDC, Inc.*, 435 U.S. 519 (1978) (bringing to a halt lower courts' tendency to impose on agencies judge-made procedural requirements that lacked a firm statutory or constitutional foundation).

<sup>138</sup> There is one such mention in one of the underlying reports. The report regarding Recommendation 69-6, regarding the compilation of statistics, notes, somewhat quaintly:

In the past, statistical study has been laborious. Today, every agency has its own computer facilities or, at nominal expense, can arrange for the use of the facilities of some other agency. The Committee is confident that, with such capability, [agencies will improve regulatory outcomes through] continuing statistical study of administrative procedures . . . .

Staff of the Office of the Chairman, *Report of the Committee on Licenses and Authorizations in Support of Recommendation No. 14*, in RECOMMENDATIONS AND REPORTS, *supra* note 26, at 287, 295.

<sup>139</sup> See ROBERT W. RYDELL ET AL., FAIR AMERICA 107-09 (2000) (reproducing photograph of IBM pavilion designed to mimic type ball from selectric typewriter and noting that 1964 World's Fair attendees enjoyed IBM's "state-of-the-art exhibit[ ]"); *International Business Machines*, NEW YORK WORLD'S FAIR 1964/1965, <http://www.nywf64.com/ibm02.shtml> (last visited Sept. 5, 2015) (describing significance of design).

cal revolution to come were present during ACUS 1.0's run, but the real transformation occurred precisely during the decade and a half that ACUS had left the scene. So perhaps the largest divergence between the old recommendations and the new ones is that most of the latter assume the existence of, and rely on, the Internet and agency websites. That is hardly a surprise, but reviewing the old recommendations does remind us of just how thoroughly new technologies have transformed how agencies go about their business.

One way of seeing this change is by matching up certain old recommendations with their ACUS 2.0 equivalents. For example, the very first recommendation, 68-1, concerned the adequacy of agency hearing facilities, stressing the need for more hearing rooms and space that was both functional and, in a word, classier.<sup>140</sup> The counterpart among the new recommendations would be 2011-4, *Agency Use of Video Hearings*.<sup>141</sup> Both are concerned with ensuring that the agency has available a functional and sufficient "place" in which to conduct adjudications.<sup>142</sup> In 1968, that meant improving physical facilities; in 2011, it meant creation of virtual spaces through technology. Similarly, the recommendation on ensuring adequate representation of the poor in rulemaking proceedings has a contemporary counterpart in the several recommendations regarding e-rulemaking, which generally have the goal of increasing the visibility of rulemakings, reducing the cost of participating therein, and making agencies directly accessible to individuals.<sup>143</sup>

The scope of this profound technological change is also made apparent by identifying recommendations that are simply obsolete because of technological developments. That category would seem to include most of the recommendations having to do with getting information—indexes for the CFR, the parallel table of statutory authorities and regulatory provisions, the Consumer Bulletin, and the improved Government Manual (the Manual still exists, but its function has largely been overtaken by agency websites).<sup>144</sup> Thus, the Par-

<sup>140</sup> ACUS Recommendation 68-1, Adequate Hearing Facilities, 1 C.F.R. § 305.68-1 (1988).

<sup>141</sup> ACUS Recommendation 2011-4, *Agency Use of Video Hearings: Best Practices and Possibilities for Expansion*, 76 Fed. Reg. 48,795, 48,796 (Aug. 9, 2011).

<sup>142</sup> Compare ACUS Recommendation 68-1, 1 C.F.R. § 305.68-1, at 52 ("Administrative hearings of the Federal Government should be conducted in dignified, efficient hearing rooms, appropriate as to size, arrangement, and furnishings."), with ACUS Recommendation 2011-4, 76 Fed. Reg. at 48,795-96 (advising agencies to consider conducting hearings via videoconference because of the flexibility, efficiency, and cost savings that this technology offers).

<sup>143</sup> See *supra* notes 102, 129, and accompanying text. The shift here is not just technological. See *supra* note 133 and accompanying text.

<sup>144</sup> See *supra* Part II.A.1.



allel Table addressed in Recommendation 68-3 is still produced, published in the Index and Finding Aids volume of the CFR—and, more relevant for most people, available online.<sup>145</sup> But it is a fairly obsolete finding aid; most researchers would find this information far more quickly with an online search. And if one does it that way, whether the official Table is accurate simply does not matter. The middleman is omitted; in essence the searcher herself does what this recommendation asked the agency to do.

Yet a third way of demonstrating the central importance of technological developments is simply to identify the number of ACUS recommendations that specifically address how agencies might or should employ new technologies. Not counting recommendations that make a passing reference to, say, the need to post something on the agency website, these include at least the following: Recommendation 2011-1 (legal considerations in e-rulemaking),<sup>146</sup> Recommendation 2011-2 (rulemaking comments),<sup>147</sup> Recommendation 2011-4 (video hearings),<sup>148</sup> Recommendation 2011-8 (innovations in e-rulemaking),<sup>149</sup> Recommendation 2013-4 (rulemaking record),<sup>150</sup> and Recommendation 2013-5 (social media in rulemaking).<sup>151</sup>

## 2. *Progress*

Stressing the thematic congruence leaves one with the impression that the administrative process is stuck in place, going round the same track over and over. In some respects, that is no doubt the case. But it is indisputable that enormous gains have been made on at least two fronts, thanks largely to the move online: the opportunities for public participation in rulemaking and the availability of agency materials and information about agency operations have massively increased. Consider one example. Recommendation 2011-5 addresses the phe-

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<sup>145</sup> See Parallel Table of Authorities and Rules, C.F.R. INDEX 833 (2014), [http://www.gpo.gov/help/parallel\\_table.pdf](http://www.gpo.gov/help/parallel_table.pdf).

<sup>146</sup> ACUS Recommendation 2011-1, Legal Considerations in e-Rulemaking, 76 Fed. Reg. 48,789 (Aug. 9, 2011).

<sup>147</sup> ACUS Recommendation 2011-2, Rulemaking Comments, 76 Fed. Reg. 48,791 (Aug. 9, 2011).

<sup>148</sup> ACUS Recommendation 2011-4, Agency Use of Video Hearings: Best Practices and Possibilities for Expansion, 76 Fed. Reg. 48,795 (Aug. 9, 2011).

<sup>149</sup> ACUS Recommendation 2011-8, Agency Innovations in E-Rulemaking, 77 Fed. Reg. 2264 (Jan. 17, 2012).

<sup>150</sup> ACUS Recommendation 2013-4, The Administrative Record in Informal Rulemaking, 78 Fed. Reg. 41,358 (July 10, 2013).

<sup>151</sup> ACUS Recommendation 2013-5, Social Media in Rulemaking, 78 Fed. Reg. 76,269 (Dec. 17, 2013).

nomenon of incorporation by reference.<sup>152</sup> The problem here arises when agencies reference privately developed standards in regulations but do not reprint them.<sup>153</sup> These standards are often copyrighted, can be difficult to find, and may require purchase for hundreds or thousands of dollars if someone wants to actually see them.<sup>154</sup> At the proposed rule stage, this interferes with the opportunity to comment; at the final rule stage, it interferes with the ability to comply. Without wading into the merits of ACUS's proposal and the debates it has engendered,<sup>155</sup> suffice it to say that the fact that this has generated controversy at all is a sign of a significant shift since the era of ACUS's first twenty-two recommendations. Private standards are *relatively* hard to find and expensive, given that publicly created law is now available to everyone, for free, on the Internet. But they are not really harder to obtain than *publicly created law* once was. In 1968, reading a regulation required a trip to the library or an expensive purchase of a hard copy of the CFR. Commenting on a proposed rule also required a trip to the library or an expensive subscription, this time in order to obtain the *Federal Register*. The reason that the difficulty of viewing incorporated private standards has become so salient is not that it is harder than it used to be; it is that everything else has become so much easier.<sup>156</sup> Whatever the merits of this particular debate, the huge strides in the availability of law generally should be celebrated.

### 3. *The Shift from Adjudication to Rulemaking*

Historically, agencies relied on adjudication for policy formulation.<sup>157</sup> The 1970s saw a fundamental shift toward rulemaking as the primary tool for agency policy formulation. The shift was starting but not yet in full swing when ACUS began operations.<sup>158</sup> In the following

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<sup>152</sup> ACUS Recommendation 2011-5, *Incorporation by Reference*, 77 Fed. Reg. 2257 (Jan. 17, 2012).

<sup>153</sup> *Id.* at 2257–58.

<sup>154</sup> See *id.* at 2258; Nina A. Mendelson, *Private Control over Access to the Law: The Perplexing Federal Regulatory Use of Private Standards*, 112 MICH. L. REV. 737, 737, 751–52 (2014).

<sup>155</sup> Two invaluable discussions are ACUS staff attorney Emily Bremer's report, later published as Emily S. Bremer, *Incorporation by Reference in an Open-Government Age*, 36 HARV. J.L. & PUB. POL'Y 131, 150–53 (2013), and Mendelson, *supra* note 154.

<sup>156</sup> See Bremer, *supra* note 155, at 152–53.

<sup>157</sup> See Pierce, *supra* note 104, at 188.

<sup>158</sup> For example, the Federal Trade Commission proposed its first trade regulation rule, regarding the labeling of cigarettes, in 1964. *Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking*, 29 Fed. Reg. 8324 (July 2, 1964). It had issued only a handful of others, and its authority to do so remained contested, when, in 1969,

decades, the shift became complete. Since most agencies now make most of their important decisions through rulemaking (the NLRB remains an outlier<sup>159</sup>), it is hardly a surprise that ACUS too has shifted its focus. In ACUS 1.0, nine or more of the twenty-two recommendations were specific to adjudication; eight if one does not count the recommendation concerning hearing examiners, who could, after all, conceivably preside over a formal rulemaking.<sup>160</sup> Only four were specific to rulemaking<sup>161</sup> and the remainder were relevant to both. As one would expect, the ratio flips in the more recent twenty-five recommendations: eleven are specific to rulemaking<sup>162</sup> and only three or four are specific to adjudication.<sup>163</sup>

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it proposed requiring gas stations to post the octane level of the gasoline they were selling. Gasoline Dispensing Pumps, 34 Fed. Reg. 12,449 (July 30, 1969). The rule was issued in final form in 1971, Posting of Minimum Octane Numbers on Gasoline Dispensing Pumps, 36 Fed. Reg. 23,871 (Dec. 16, 1971), and upheld by the D.C. Circuit two years later in the well-known case of *National Petroleum Refiners Ass'n v. FTC*. 482 F.2d 672, 698 (D.C. Cir. 1973).

<sup>159</sup> See Zev J. Eigen & Sandro Garofalo, *Less Is More: A Case for Structural Reform of the National Labor Relations Board*, 98 MINN. L. REV. 1879, 1884–85 (2014).

<sup>160</sup> These were Recommendations 68-1 (adequate hearing facilities), 68-6 (delegation of final decisionmaking authority), 69-5 (duplicative FAA safety hearings), 69-7 (consideration of alternatives in licensing), 69-9 (recruitment and training of hearing examiners), 70-2 (SEC no-action letters), 70-3 (summary decisions in formal adjudication), 70-4 (discovery in formal adjudication), and 70-5 (guidance regarding Renegotiation Board determinations). In addition, two recommendations concerned judicial review and enforcement of agency orders—68-8 (review of ICC orders) and 69-2 (enforcement of NLRB orders). See *Recommendations (1968–1995)*, ADMIN. CONF. U.S., <http://www.acus.gov/recommendations/historical-recommendations-1968-1995> (last visited Sept. 5, 2015).

<sup>161</sup> These were Recommendations 68-3 (parallel statement of statutory authorities and rules), 68-5 (representation of the poor in rulemaking proceedings), 69-4 (CFR indexes), and 69-8 (elimination of exemption from notice-and-comment requirement). See *id.*

<sup>162</sup> These were Recommendations 2010-1 (preemption), 2011-1 (legal considerations in e-rulemaking), 2011-2 (rulemaking comments), 2011-5 (incorporation by reference in regulations), 2011-8 (e-rulemaking), 2012-1 (regulatory analysis requirements), 2012-2 (midnight rules), 2013-2 (benefit-cost analysis in independent agency rulemakings), 2013-4 (the record in informal rulemaking), and 2013-5 (use of social media in rulemaking), as well as Statement # 18 (timeliness of OIRA regulatory review). See *Recommendations (2010–Present)*, ADMIN. CONF. U.S., <http://www.acus.gov/recommendations/current-recommendations-2010-present> (last visited Sept. 5, 2015).

<sup>163</sup> These were Recommendations 2011-4 (video hearings), 2012-3 (immigration removal adjudication), 2012-8 (inflation adjustments for civil penalties), and 2013-1 (consistency in social security adjudications). In fact, in recent years the Conference has devoted more attention to adjudication than this tally implies. In particular, the Social Security Administration has commissioned a number of projects. See generally Gerald K. Ray & Jeffrey S. Lubbers, *A Government Success Story: How Data Analysis by the Social Security Appeals Council (with a Push from the Administrative Conference of the United States) Is Transforming Social Security Disability Adjudication*, 83 GEO. WASH. L. REV. 1575 (2015). The general point—that the move to rulemaking as the preferred, and almost exclusive, tool for policymaking is reflected in the Conference's output—stands, however.

#### 4. *The Shift in Specific Agencies*

The recommendations and reports from ACUS 1.0 are populated by ghosts. The late and sometimes lamented Interstate Commerce Commission and the Renegotiation Board were each the subject of a specific recommendation.<sup>164</sup> Other agencies that received significant attention, such as the NLRB, the SEC, and the FAA, while still important, do not loom as large as they once did. Absent from the first set of recommendations, of course, are the whole range of agencies created since 1970 with jurisdiction over health, safety, consumer protection, and the environment. Recommendation 68-4 hints at the consumer-protection movement, endorsing the idea of a “consumer bulletin,”<sup>165</sup> but the Consumer Product Safety Commission and the Consumer Financial Protection Bureau did not yet exist.<sup>166</sup> Not to mention three 600-pound gorillas created in 1970: the Occupational Safety and Health Administration,<sup>167</sup> the National Highway Traffic Safety Administration,<sup>168</sup> and, perhaps most important, the Environmental Protection Agency (“EPA”). President Nixon created the EPA through an Executive Order, Reorganization Plan No. 3,<sup>169</sup> which was submitted to Congress on July 9, 1970. ACUS’s fourth plenary session, the last to be considered in this survey, had taken place just five weeks earlier, on June 2nd and 3rd.<sup>170</sup> Little did they know.

#### 5. *The Shift in Regulatory Missions and Agendas*

Behind the change in particular agencies lies a more fundamental change in the nature of regulation. ACUS came into being when traditional economic regulation still dominated federal agency activity. Over the course of the following decade, Congress, with strong bipartisan support, moved decisively away from regulating prices and

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<sup>164</sup> RECOMMENDATION 68-8, *supra* note 78 (judicial review of Interstate Commerce Commission orders); RECOMMENDATION 70-5, *supra* note 41 (practices and procedures of the Renegotiation Board).

<sup>165</sup> RECOMMENDATION 68-4, *supra* note 35, at 1.

<sup>166</sup> See Consumer Product Safety Act, Pub. L. No. 92-573, 86 Stat. 1207, 1210 (1972) (establishing the Consumer Product Safety Commission); *Creating the Consumer Bureau*, CONSUMER FIN. PROT. BUREAU, <http://www.consumerfinance.gov/the-bureau/creatingthebureau/> (last visited Sept. 5, 2015) (noting that Congress created the Consumer Financial Protection Bureau in 2010).

<sup>167</sup> See *All About OSHA*, OCCUPATIONAL SAFETY & HEALTH ADMIN., <https://www.osha.gov/Publications/3302-06N-2006-English.html> (last visited Sept. 5, 2015).

<sup>168</sup> See Highway Safety Act of 1970, Pub. L. No. 91-605, 84 Stat. 1713, 1739.

<sup>169</sup> Reorganization Plan No. 3 of 1970, 35 Fed. Reg. 15,623 (Oct. 6, 1970).

<sup>170</sup> See *Historical Timeline*, ADMIN. CONF. U.S., <https://www.acus.gov/50/timeline/1970%20-%201979> (last visited Sept. 5, 2015).



market entry and toward regulating externalities. These substantive shifts are not on the surface of any of the ACUS recommendations, but they are lurking in the background.

### 6. *Increasing Attention to the Problem of "Silos"*

The first twenty-two ACUS recommendations treat agencies as freestanding entities. Several address the internal operations of agencies, but *none* addresses, or even seems aware of, issues regarding the relationships among agencies, or between agencies and the White House or other regulatory actors, including *private* parties who are working with or for the agency. This silence cannot possibly be attributed to an inherent blind spot.<sup>171</sup> To the contrary, this is just the sort of issue to which one would expect both the public and the governmental members of ACUS to be acutely alert.

In contrast, the latter group of recommendations reflects a keen awareness that agencies operate in a complex world. Almost a third fit this description, including the recommendations that address preemption (i.e., the relationship between federal and state regulators),<sup>172</sup> the ethical obligations of government contractors,<sup>173</sup> federal advisory committees,<sup>174</sup> the use of third parties to determine whether regulated entities are in compliance,<sup>175</sup> international regulatory cooperation,<sup>176</sup> coordination and cooperation among agencies with overlapping responsibilities,<sup>177</sup> and regulatory review by OIRA.<sup>178</sup>

The explanation for this shift is beyond the scope of this Article. Three factors may be at work. First, as the federal government continues to increase in complexity and scope, with multiple agencies pos-

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<sup>171</sup> Cf. *supra* Part III.B (suggesting that ACUS's failure to discuss agency capture may be attributable to a blind spot).

<sup>172</sup> Recommendation 2010-1, *supra* note 89.

<sup>173</sup> ACUS Recommendation 2011-3, Compliance Standards for Government Contractor Employees—Personal Conflicts of Interest and Use of Certain Non-Public Information, 76 Fed. Reg. 48,792 (Aug. 9, 2011).

<sup>174</sup> ACUS Recommendation 2011-7, The Federal Advisory Committee Act—Issues and Proposed Reforms, 77 Fed. Reg. 2261 (Jan. 17, 2012).

<sup>175</sup> ACUS Recommendation 2012-7, Agency Use of Third-Party Programs to Assess Regulatory Compliance, 78 Fed. Reg. 2941 (Jan. 15, 2013).

<sup>176</sup> ACUS Recommendation 2011-6, International Regulatory Cooperation, 77 Fed. Reg. 2259 (Jan. 17, 2012).

<sup>177</sup> See ACUS Recommendation 2012-5, Improving Coordination of Related Agency Responsibilities, 77 Fed. Reg. 47,810 (Aug. 10, 2012); ACUS Recommendation 2013-7, GPRA Modernization Act of 2010: Examining Constraints to, and Providing Tools for, Cross-Agency Collaboration, 78 Fed. Reg. 76,273 (Dec. 17, 2013).

<sup>178</sup> ACUS Statement # 18, 78 Fed. Reg. 76,275 (Dec. 17, 2013).

sessing overlapping responsibilities,<sup>179</sup> the silo effect and related issues have become more salient and inescapable. Second, technological changes have made the silo effect particularly problematic in settings where information systems cannot communicate with each other. Indeed, this is the most familiar use of the term, as in “information silos.”<sup>180</sup> It could be that the government’s information silo problem, and these technological challenges generally, have sensitized observers to corresponding problems outside the information technology setting. Third—and this is a central point of this article—ACUS is inescapably subject to the intellectual currents of the world in which it operates. For whatever reason, agency interactions have become a focus of academics and government officials alike in recent years.<sup>181</sup> Accordingly, it is hardly a surprise to see these issues appear in ACUS’s recommendations.

## 7. Presidential Management

As mentioned in Part II,<sup>182</sup> ACUS’s early years preceded the “counter-reformation” and its emphasis on presidential oversight. The President is quite invisible in the first twenty-two recommendations. Indeed, executive—as opposed to independent—agencies are relatively hidden; the independent regulatory commissions overshadow them. In the modern counterparts, that has changed. Presidential oversight generally, and regulatory review in particular, are taken as given; ACUS’s goal is not to rethink these phenomena but rather to make such supervision as efficient and useful as possible.<sup>183</sup>

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<sup>179</sup> See generally Michael Doran, *Legislative Organization and Administrative Redundancy*, 91 B.U. L. REV. 1815 (2011).

<sup>180</sup> See Stacy A. Baird, *Government Role and the Interoperability Ecosystem*, 5 I/S: J.L. & POL’Y FOR INFO. SOC’Y 219, 243–45 (2009).

<sup>181</sup> See, e.g., Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131 (2012); Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 SUP. CT. REV. 201; Jason Marisam, *Interagency Administration*, 45 ARIZ. ST. L.J. 183 (2013).

<sup>182</sup> See *supra* Part II.

<sup>183</sup> See ACUS Recommendation 2012-1, *Regulatory Analysis Requirements*, 77 Fed. Reg. 47,801 (Aug. 10, 2012); ACUS Recommendation 2013-2, *Benefit-Cost Analysis at Independent Regulatory Agencies*, 78 Fed. Reg. 41,355 (July 10, 2013); ACUS Statement # 18, 78 Fed. Reg. at 76,275. Another modern recommendation that reflects the new presidentialism is Recommendation 2012-2, *Midnight Rules*. ACUS Recommendation 2012-2, *Midnight Rules*, 77 Fed. Reg. 47,802 (Aug. 10, 2012).

CONCLUSION:  
THE CONTINUING "REFORMATION OF AMERICAN  
ADMINISTRATIVE LAW"

Richard Stewart's *The Reformation of American Administrative Law*<sup>184</sup> appeared in 1975. The reformation Professor Stewart identified was underway but not yet complete when ACUS got to work. Several of ACUS's early projects reflect the reformation; Recommendation 68-5,<sup>185</sup> regarding the representation of the poor in rulemaking, is the purest example. But administrative law continued and continues to be reformed; the interest representation model no longer dominates, either descriptively or normatively. And just as the transformations that Stewart described can be seen in the early ACUS projects, so the transformations that have taken place since then can be seen in the projects that the new ACUS has undertaken. Among these changes, the rise of new technologies looms largest. If the administrative state is truly being refashioned by the new technologies, not only will we see it in ACUS's recommendations, but those recommendations will themselves help shape and define the new era, as they have for half a century.

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<sup>184</sup> Stewart, *supra* note 6.

<sup>185</sup> ACUS Recommendation 68-5, Representation of the Poor in Agency Rulemaking of Direct Consequence to Them, 1 C.F.R. § 305.68-5 (1993).

## APPENDIX A

Recommendations from ACUS's First First Three Years

1. Recommendation 68-1, *Adequate Hearing Facilities*,<sup>186</sup> urges the General Services Administration to maintain an inventory of administrative hearing facilities, develop hearing spaces suitable to the seriousness of an adjudicatory proceeding, and coordinate with the federal and state judiciaries concerning the possibility of using judicial courtrooms for administrative hearings.

2. Recommendation 68-2, *U.S. Government Organization Manual*,<sup>187</sup> points out that the agency-specific descriptions included in the *Manual* are often “outdated, unrevealing, cumbersome, or otherwise deficient.”<sup>188</sup> It urges each agency required to submit information on its organization and functions for publication in the *Manual* under 5 U.S.C. § 552, to assign the drafting task to an office that is up to the task, and to include in the description information concerning how additional information about the agency can be obtained.

3. Recommendation 68-3, *Parallel Table of Statutory Authorities and Rules (2 CFR Ch. 1)*.<sup>189</sup> The Parallel Table is a two-column list of all statutory provisions on which agencies have relied in issuing regulations that appear in the Code of Federal Regulations, together with the portion of the CFR where those regulations are found. This recommendation reports that the table is inaccurate and incomplete. It urges agencies to review their entries and submit corrections to the Office of the Federal Register (“OFR”) and encourages the OFR to include in the table not only provisions cited by agencies in the formal statement of authority, but also provisions cited in preambles and codified text.

4. Recommendation 68-4, *Consumer Bulletin*,<sup>190</sup> recommends the publication, on a trial basis, of a bulletin, circulated to “the press, consumer organizations, public and scholastic libraries, and individuals who request to be put on the mailing list,”<sup>191</sup> describing recent federal agency actions of interest and significance to consumers.

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186 ACUS Recommendation 68-1, *Adequate Hearing Facilities*, 1 C.F.R. § 305.68-1 (1988).

187 RECOMMENDATION 68-2, *supra* note 29.

188 *Id.* at 1.

189 RECOMMENDATION 68-3, *supra* note 31.

190 RECOMMENDATION 68-4, *supra* note 35.

191 *Id.* at 1.



5. Recommendation 68-5, *Representation of the Poor in Agency Rulemaking of Direct Consequence to Them*.<sup>192</sup> The most controversial of the early recommendations, this multipart recommendation proposes several initiatives to ensure that federal agencies do not overlook the interests of poor people when conducting rulemakings. First, it urges federal agencies to undertake affirmative efforts and outreach to ensure they receive input from poor people with regard to rulemakings that may have a substantial effect on the poor. These efforts could include holding hearings in convenient locations, directly soliciting submissions from representatives of the poor, conducting field surveys of poor people, and setting up advisory committees consisting of representatives of poor people. In addition, when necessary, agencies should reimburse individuals for expenses or lost wages attributable to rulemaking participation. Third, Congress should authorize and fund a quasi-governmental entity to serve as "People's Counsel," the staff of which would "represent the interests of the poor in all Federal administrative rulemaking substantially affecting the poor."<sup>193</sup>

6. Recommendation 68-6, *Delegation of Final Decisional Authority Subject to Discretionary Review by the Agency*,<sup>194</sup> encourages development of intermediate appellate panels within agencies and greater reliance on making initial decisions final, though subject to discretionary review, so as to reduce the burdens on agency heads of having to review all formal adjudications.

7. Recommendation 68-7, *Elimination of Jurisdictional Amount Requirement in Judicial Review*,<sup>195</sup> urges elimination of the amount-in-controversy requirement contained in 28 U.S.C. § 1331 (federal-question jurisdiction) in cases challenging agency action.

8. Recommendation 68-8, *Judicial Review of Interstate Commerce Commission Orders*,<sup>196</sup> recommends that Interstate Commerce Commission cases that are currently sent to a three-judge district court should instead be heard by the Courts of Appeals.

9. Recommendation 69-1, *Statutory Reform of the Sovereign Immunity Doctrine*.<sup>197</sup> Asserting that "[t]he technical legal defense of

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<sup>192</sup> ACUS Recommendation 68-5, *Representation of the Poor in Agency Rulemaking of Direct Consequence to Them*, 1 C.F.R. § 305.68-5 (1993).

<sup>193</sup> *Id.* at 58.

<sup>194</sup> ACUS Recommendation 68-6, *Delegation of Final Decisional Authority Subject to Discretionary Review by the Agency*, 1 C.F.R. § 305.68-6 (1993).

<sup>195</sup> RECOMMENDATION 68-7, *supra* note 73.

<sup>196</sup> RECOMMENDATION 68-8, *supra* note 78.

<sup>197</sup> RECOMMENDATION 69-1, *supra* note 75.

sovereign immunity . . . has become in large measure unacceptable,”<sup>198</sup> this recommendation seeks amendments to sections 702 and 703 of the APA to make clear that sovereign immunity does not bar challenges to agency action.

10. Recommendation 69-2, *Judicial Enforcement of Orders of the National Labor Relations Board*,<sup>199</sup> reasserts a recommendation from the temporary Administrative Conference of 1961–62 that orders of the NLRB, like those of all or most other agencies, be made automatically judicially enforceable, without any further proceeding to obtain judicial confirmation of the orders’ terms.

11. Recommendation 69-3, *Publication of a “Guide to Federal Reporting Requirements.”*<sup>200</sup> Noting the popularity of the *Guide to Record Retention Requirements*, this endorses a counterpart publication listing agency-by-agency reporting requirements and their statutory or regulatory bases.

12. Recommendation 69-4, *Analytical Subject-Indexes to Selected Volumes of the Code of Federal Regulations*,<sup>201</sup> urges all agencies contributing “substantially” to the CFR to determine whether analytic subject indexes for their CFR volumes would be appropriate, and, if so, to produce such indexes.

13. Recommendation 69-5, *Elimination of Duplicative Hearings in FAA Safety De-certification Cases*,<sup>202</sup> recommends that the FAA abandon its practice of conducting full trial-type hearings in order to make a preliminary determination that licenses or permits should be revoked prior to referring the matter to the National Transportation Safety Board, as that agency then holds its own full trial-type hearing before making a final determination.

14. Recommendation 69-6, *Compilation of Statistics on Administrative Proceedings by Federal Departments and Agencies*,<sup>203</sup> recommends that agencies compile annual statistics tabulating the number and pace of resolution of all “proceedings”—rulemaking and adjudication, formal and informal—that fix the rights, privileges, and obligations of private entities. The goal is to learn and publicize just how many proceedings each agency began, had pending, and concluded in

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<sup>198</sup> *Id.* at 1.

<sup>199</sup> ACUS Recommendation 69-2, *Judicial Enforcement of Orders of the National Labor Relations Board*, 1 C.F.R. § 305.69-2 (1993).

<sup>200</sup> RECOMMENDATION 69-3, *supra* note 36.

<sup>201</sup> RECOMMENDATION 69-4, *supra* note 37.

<sup>202</sup> RECOMMENDATION 69-5, *supra* note 53.

<sup>203</sup> ACUS Recommendation 69-6, *Compilation of Statistics on Administrative Proceedings by Federal Departments and Agencies*, 1 C.F.R. § 305.69-6 (1993).

each year, leading to and enabling efforts to reduce delays and expense.

15. Recommendation 69-7, *Consideration of Alternatives in Licensing Procedures*.<sup>204</sup> Prompted by *Scenic Hudson Preservation Conference v. Federal Power Commission*<sup>205</sup> and similar decisions, this recommendation urges each licensing agency to develop agency-specific procedures and guidelines for consideration of alternatives to the applicant's proposed project.

16. Recommendation 69-8, *Elimination of Certain Exemptions from the APA Rulemaking Requirements*.<sup>206</sup> This two-prong attack on 5 U.S.C. § 553(a)(2), which exempts rulemakings regarding "public property, loans, grants, benefits, or contracts,"<sup>207</sup> calls on Congress to repeal the provision outright, and urges agencies voluntarily to provide notice and comment process for such rules even when not statutorily required except when there is good cause not to do so.

17. Recommendation 69-9, *Recruitment and Selection of Hearing Examiners; Continuing Training for Government Attorneys and Hearing Examiners; Creation of a Center for Continuing Legal Education in Government*.<sup>208</sup> This recommendation contains a variety of proposals regarding hearing examiners, including expansion of the applicant pool, elimination of the veterans' preference, a three-year trial program to test alternative selection measures, and expansion of continuing legal education for hearing examiners within each agency, government-wide, and by private entities.

18. Recommendation 70-1, *Parties Defendant*.<sup>209</sup> This recommendation sought to eliminate dismissal of actions against agencies where the plaintiff failed to identify properly the defendant; it called on the Department of Justice to call such defects to the courts' attention so that the plaintiff could amend its pleadings and on Congress to make statutory amendments to liberalize standards for naming government defendants and serving process.

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204 ACUS Recommendation 69-7, *Consideration of Alternatives in Licensing Procedures*, 1 C.F.R. § 305.69-7 (1975).

205 *Scenic Hudson Pres. Conference v. Fed. Power Comm'n*, 354 F.2d 608 (2d Cir. 1965).

206 ACUS Recommendation 69-8, *Elimination of Certain Exemptions from the APA Rulemaking Requirements*, 1 C.F.R. § 305.69-8 (1993).

207 *Id.* at 62.

208 ACUS Recommendation 69-9, *Recruitment and Selection of Hearing Examiners; Continuing Training for Government Attorneys and Hearing Examiners; Creation of a Center for Continuing Legal Education in Government*, 1 C.F.R. § 305.69-9 (1988).

209 RECOMMENDATION 70-1, *supra* note 76.

19. Recommendation 70-2, *SEC No-Action Letters Under Section 4 of the Securities Act of 1933*,<sup>210</sup> sought to increase the transparency and availability of the standards applied by the SEC in deciding whether to issue a no-action letter informing parties in advance of a transaction that SEC staff does not consider a violation of federal securities laws.

20. Recommendation 70-3, *Summary Decision in Agency Adjudication*.<sup>211</sup> This is a model procedural rule providing for summary disposition in formal adjudications where there is no genuine issue as to any material fact.

21. Recommendation 70-4, *Discovery in Agency Adjudication*.<sup>212</sup> By far the lengthiest early recommendation, this lays out a set of minimum procedural rules to govern discovery in formal adjudications.

22. Recommendation 70-5, *Practices and Procedures Under the Renegotiation Act of 1951*,<sup>213</sup> calls on the Renegotiation Board to make public the criteria it uses in decisionmaking, provide more extensive and thorough written decisions, and make available upon request by a contractor all reports it has received regarding the contractor's performance under existing contracts.

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<sup>210</sup> RECOMMENDATION 70-2, *supra* note 39.

<sup>211</sup> ACUS Recommendation 70-3, *Summary Decision in Agency Adjudication*, 1 C.F.R. § 305.70-3 (1993).

<sup>212</sup> ACUS Recommendation 70-4: *Discovery in Agency Adjudication*, 1 C.F.R. § 305.70-4 (1988).

<sup>213</sup> RECOMMENDATION 70-5, *supra* note 41.



## APPENDIX B

Recommendations from ACUS's *Second First Three Years*<sup>214</sup>

1. Recommendation 2010-1, *Agency Procedures for Considering Preemption of State Law*.<sup>215</sup> Reiterates a previous Conference recommendation that Congress clearly state its preemptive intent in the text of the statutes it charges federal agencies with implementing. It recommends that agencies formulate appropriate internal procedures to ensure consultation with representatives of state interests and to ensure that agencies evaluate the authority and basis asserted in support of a preemptive rulemaking. It seeks to increase transparency regarding internal agency policies and recommends ways to improve external mechanisms for enforcing the applicable federal requirements.

2. Recommendation 2011-1, *Legal Considerations in e-Rulemaking*.<sup>216</sup> Provides guidance on issues that have arisen in light of the change from paper to electronic rulemaking procedures.

3. Recommendation 2011-2, *Rulemaking Comments*.<sup>217</sup> Recognizes innovations in the commenting process that could promote public participation and improve rulemaking outcomes. The recommendation encourages agencies (1) to provide public guidance on how to submit effective comments, (2) to leave comment periods open for sufficient periods, generally at least sixty days for significant regulatory actions and thirty days for other rulemakings, (3) to post comments received online within a specified period after submission, (4) to announce policies for anonymous and late-filed comments, and (5) to consider when reply and supplemental comment periods are useful.

4. Recommendation 2011-3, *Compliance Standards for Government Contractor Employees—Personal Conflicts of Interest and Use of Certain Non-Public Information*.<sup>218</sup> Responds to agencies' need to protect integrity and the public interest when they rely on contractors.

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<sup>214</sup> These summaries are ACUS's, available at its website, [www.acus.gov](http://www.acus.gov), but have in some instances been edited for length.

<sup>215</sup> ACUS Recommendation 2010-1, *Agency Procedures for Considering Preemption of State Law*, 76 Fed. Reg. 81 (Jan. 3, 2011).

<sup>216</sup> ACUS Recommendation 2011-1, *Legal Considerations in e-Rulemaking*, 76 Fed. Reg. 48,789 (Aug. 9, 2011).

<sup>217</sup> ACUS Recommendation 2011-2, *Rulemaking Comments*, 76 Fed. Reg. 48,791 (Aug. 9, 2011).

<sup>218</sup> ACUS Recommendation 2011-3, *Compliance Standards for Government Contractor Employees—Personal Conflicts of Interest and Use of Certain Non-Public Information*, 76 Fed. Reg. 48,792 (Aug. 9, 2011).

The Conference recommends that the Federal Acquisition Regulatory Council provide model language for agency contracting officers to use when negotiating or administering contracts that pose particular risks that employees of contractors could have personal conflicts of interest or could misuse non-public information.

5. Recommendation 2011-4, *Agency Use of Video Hearings: Best Practices and Possibilities for Expansion*.<sup>219</sup> Encourages agencies to consider the use of video teleconferencing technology for hearings and other administrative proceedings, sets out relevant factors, and identifies best practices for the implementation of this technology.

6. Recommendation 2011-5, *Incorporation by Reference*.<sup>220</sup> Addresses legal and policy issues related to agencies' incorporation by reference in the Code of Federal Regulations of standards or other materials that have been published elsewhere.

7. Recommendation 2011-6, *International Regulatory Cooperation*.<sup>221</sup> Addresses how U.S. regulators can interact with foreign authorities to accomplish their domestic regulatory missions and eliminate unnecessary non-tariff barriers to trade, proposing enhanced cooperation and information gathering, more efficient deployment of limited resources, and better information exchanges.

8. Recommendation 2011-7, *The Federal Advisory Committee Act—Issues and Proposed Reforms*.<sup>222</sup> Includes proposals designed to clarify the scope of FACA and its implementing regulations, alleviate certain procedural burdens associated with the existing regime, and promote “best practices” aimed at enhancing the transparency and objectivity of the advisory committee process.

9. Recommendation 2011-8, *Agency Innovations in E-Rulemaking*.<sup>223</sup> Addresses how federal agency rulemaking can be improved by better use of Internet-based technologies. The recommendation also addresses the issue of improving e-rulemaking participation by those who have historically faced barriers to access, including non-English

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<sup>219</sup> ACUS Recommendation 2011-4, *Agency Use of Video Hearings: Best Practices and Possibilities for Expansion*, 76 Fed. Reg. 48,795 (Aug. 9, 2011).

<sup>220</sup> ACUS Recommendation 2011-5, *Incorporation by Reference*, 77 Fed. Reg. 2257 (Jan. 17, 2012).

<sup>221</sup> ACUS Recommendation 2011-6, *International Regulatory Cooperation*, 77 Fed. Reg. 2259 (Jan. 17, 2012).

<sup>222</sup> ACUS Recommendation 2011-7, *The Federal Advisory Committee Act—Issues and Proposed Reforms*, 77 Fed. Reg. 2261 (Jan. 17, 2012).

<sup>223</sup> ACUS Recommendation 2011-8, *Agency Innovations in E-Rulemaking*, 77 Fed. Reg. 2264 (Jan. 17, 2012).

speakers, users of low-bandwidth Internet connections, and individuals with disabilities.

10. Recommendation 2012-1, *Regulatory Analysis Requirements*.<sup>224</sup> Considers the various regulatory analysis requirements imposed upon agencies by both executive orders and statutes. It offers recommendations designed to ensure that agencies satisfy the existing requirements in the most efficient and transparent manner possible. It also provides recommendations on streamlining the existing analysis requirements.

11. Recommendation 2012-2, *Midnight Rules*.<sup>225</sup> Addresses several issues raised by the publication of rules in the final months of a presidential administration. The recommendation offers a number of proposals for limiting the practice of issuing midnight rules by incumbent administrations and enhancing the powers of incoming administrations to review midnight rules.

12. Recommendation 2012-3, *Immigration Removal Adjudication*.<sup>226</sup> Suggests a number of ways to enhance efficiency and fairness in immigration removal cases.

13. Recommendation 2012-4, *Paperwork Reduction Act*.<sup>227</sup> Recommends ways to improve public engagement in the creation and review of information collection requests and to make the process more efficient for the agencies and the Office of Management and Budget. It also suggests ways to streamline the review and approval process without increasing the burden on the public of agency information collections.

14. Recommendation 2012-5, *Improving Coordination of Related Agency Responsibilities*.<sup>228</sup> Addresses the problem of overlapping and fragmented procedures associated with assigning multiple agencies similar or related functions, or dividing authority among agencies. The recommendation proposes some reforms aimed at improving coordination of agency policymaking, including joint rulemaking, inter-agency agreements, agency consultation provisions, and tracking and evaluating the effectiveness of coordination initiatives.

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<sup>224</sup> ACUS Recommendation 2012-1, *Regulatory Analysis Requirements*, 77 Fed. Reg. 47,801 (Aug. 10, 2012).

<sup>225</sup> ACUS Recommendation 2012-2, *Midnight Rules*, 77 Fed. Reg. 47,802 (Aug. 10, 2012).

<sup>226</sup> ACUS Recommendation 2012-3, *Immigration Removal Adjudication*, 77 Fed. Reg. 47,804 (Aug. 10, 2012).

<sup>227</sup> ACUS Recommendation 2012-4, *Paperwork Reduction Act*, 77 Fed. Reg. 47,808 (Aug. 10, 2012).

<sup>228</sup> ACUS Recommendation 2012-5, *Improving Coordination of Related Agency Responsibilities*, 77 Fed. Reg. 47,810 (Aug. 10, 2012).

15. Recommendation 2012-6, *Reform of 28 U.S.C. Section 1500*.<sup>229</sup> Urges Congress to repeal section 1500, which divests the U.S. Court of Federal Claims of jurisdiction when a plaintiff has claims against the government based on substantially the same operative facts pending in another court, and replace it with a provision that would create a presumption that in such circumstances later-filed actions would be stayed.

16. Recommendation 2012-7, *Agency Use of Third-Party Programs to Assess Regulatory Compliance*.<sup>230</sup> Sets forth guidance for federal agencies that are establishing, or considering establishing, programs in which third parties assess whether regulated entities are in compliance with regulatory standards and other requirements.

17. Recommendation 2012-8, *Inflation Adjustment Act*.<sup>231</sup> Addresses issues under the Federal Civil Penalties Inflation Adjustment Act,<sup>232</sup> urging Congress to change the current statutory framework to address three provisions that result in penalty adjustments that may not track the actual rate of inflation.

18. Recommendation 2013-1, *Improving Consistency in Social Security Disability Adjudications*.<sup>233</sup> Identifies ways to improve the adjudication of Social Security disability benefits claims before administrative law judges and the Appeals Council, suggests changes to the evaluation of opinion evidence from medical professionals, and encourages the agency to enhance data capture and reporting.

19. Recommendation 2013-2, *Benefit-Cost Analysis at Independent Regulatory Agencies*.<sup>234</sup> Highlights a series of best practices directed at independent regulatory agencies in the preparation of benefit-cost analyses that accompany proposed and final rules.

20. Recommendation 2013-3, *Science in the Administrative Process*.<sup>235</sup> Promotes transparency in agencies' scientific decisionmaking,

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<sup>229</sup> ACUS Recommendation 2012-6, *Reform of 28 U.S.C. Section 1500*, 78 Fed. Reg. 2939 (Jan. 15, 2013).

<sup>230</sup> ACUS Recommendation 2012-7, *Agency Use of Third-Party Programs to Assess Regulatory Compliance*, 78 Fed. Reg. 2941 (Jan. 15, 2013).

<sup>231</sup> ACUS Recommendation 2012-8, *Inflation Adjustment Act*, 78 Fed. Reg. 2943 (Jan. 15, 2013).

<sup>232</sup> Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. No. 101-410, 104 Stat. 890.

<sup>233</sup> ACUS Recommendation 2013-1, *Improving Consistency in Social Security Disability Adjudications*, 78 Fed. Reg. 41,352 (July 10, 2013).

<sup>234</sup> ACUS Recommendation 2013-2, *Benefit-Cost Analysis at Independent Regulatory Agencies*, 78 Fed. Reg. 41,355 (July 10, 2013).

<sup>235</sup> ACUS Recommendation 2013-3, *Science in the Administrative Process*, 78 Fed. Reg. 41,357 (July 10, 2013).



including: articulation of questions to be informed by scientific information; attribution for agency personnel who contributed to scientific analyses; public access to underlying data and literature; and conflict-of-interest disclosures for privately funded research used by the agencies in licensing, rulemaking, or other administrative processes.

21. Recommendation 2013-4, *The Administrative Record in Informal Rulemaking*.<sup>236</sup> Offers best practices for agencies in the compilation, preservation, and certification of records in informal rulemaking, and supports the judicial presumption of regularity for agency administrative records except in certain limited circumstances.

22. Recommendation 2013-5, *Social Media in Rulemaking*.<sup>237</sup> Provides guidance to agencies on whether, how, and when social media might be used both lawfully and effectively to support rulemaking activities.

23. Recommendation 2013-6, *Remand Without Vacatur*.<sup>238</sup> Examines the judicial remedy of remand without vacatur on review of agency actions and equitable factors that may justify its application. The recommendation offers guidance for courts that remand agency actions and for agencies responding to judicial remands.

24. Recommendation 2013-7, *GPRA Modernization Act of 2010: Examining Constraints To, and Providing Tools For, Cross-Agency Collaboration*.<sup>239</sup> Examines perceived and real constraints to cross-agency collaboration under the Government Performance and Results Act (GPRA) Modernization Act<sup>240</sup> and highlights tools available to help agencies collaborate. It offers guidance to help increase transparency, improve information sharing, and facilitate better agency reporting under the Act. The recommendation is also aimed at enhancing the role of agency attorneys and other agency staff in facilitating cross-agency collaboration.

25. Statement # 18 (2013), *Improving the Timeliness of OIRA Regulatory Review*.<sup>241</sup> Without making an actual recommendation,

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<sup>236</sup> ACUS Recommendation 2013-4, *The Administrative Record in Informal Rulemaking*, 78 Fed. Reg. 41,358 (July 10, 2013).

<sup>237</sup> ACUS Recommendation 2013-5, *Social Media in Rulemaking*, 78 Fed. Reg. 76,269 (Dec. 17, 2013).

<sup>238</sup> ACUS Recommendation 2013-6, *Remand Without Vacatur*, 78 Fed. Reg. 76,272 (Dec. 17, 2013).

<sup>239</sup> ACUS Recommendation 2013-7, *GPRA Modernization Act of 2010: Examining Constraints to, and Providing Tools for, Cross-Agency Collaboration*, 78 Fed. Reg. 76,273 (Dec. 17, 2013).

<sup>240</sup> Government Performance and Results Act (GPRA) Modernization Act, 5 U.S.C. § 306; 31 U.S.C. §§ 1115–16, 1120–25 (2012).

<sup>241</sup> ACUS Statement # 18, 78 Fed. Reg. 76,275 (Dec. 17, 2013).

this statement highlights potential mechanisms for improving review times of rules under review by the Office of Information and Regulatory Affairs (“OIRA”), including promoting enhanced coordination between OIRA and agencies prior to the submission of rules, encouraging increased transparency concerning the reasons for delayed reviews, and ensuring that OIRA has adequate staffing to complete reviews in a timely manner.